IN THE

United States Circuit Court of Appeals

FOR THE NINTH JUDICIAL CIRCUIT

ALASKA STEAMSHIP COMPANY, a Corporation, Claimant of the Steamship "ALAMEDA", Her Engines, Boilers, Tackle, Apparel and Furniture, *Appellant,*	No. 2276.
vs.	
THE INLAND NAVIGATION COMPANY, a Corporation, *Appellee.*	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

Brief of Appellant

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STATEMENT OF THE CASE.

This cause comes before this court on appeal from a judgment of the District Court in favor of appellee, in a suit in admiralty for recovery of damages caused by a collision between the steamship "Alameda," owned by appellant, and the steamer "Telegraph," owned by appellee, occurring at the Seattle docks on April 25th, 1912, through the negligence of the engineer of the "Alameda" in not obeying the orders of the master. The liability of the "Alameda" was admitted, so the only question be-

fore the lower court was that of the amount of damages to be awarded appellee as the value of the "Telegraph."

The principal question, therefore, to be determined on this appeal, as presented by the Assignments of Error, is the amount appellee is entitled to recover as the value of the "Telegraph." Appellant's contentions in respect thereto may be classified as follows:

I.

That the general rule of law, applicable both in admiralty and common-law suits, is that the market value of property totally destroyed tortiously, is the measure of recovery, where the evidence shows that such property had a market value at the time of its destruction.

II.

That the evidence in this case shows conclusively that there was a market for the "Telegraph" at the time and place of her destruction, and that her market value did not then exceed $25,000, which would be the limit of appellee's recovery in this case, with interest and costs.

III.

That the trial court erred in holding that the rule of market value did not apply in this case,

under the evidence in the case; and erred in finding the value of the "Telegraph" at the time of her detruction, under the evidence in the case, to be the sum of $45,000, or any sum in excess of $25,000.

IV.

Appellant will also contend that there is no evidence in the case to sustain the finding of the trial court that the value of the "Telegraph" was $45,000; and no competent testimony in the case to sustain a finding of any value in excess of $25,000, even if the rule of market value be held not to apply in this case.

SPECIFICATIONS OF ERRORS RELIED UPON.

I.

The court erred in finding and decreeing that the value of said steamship "Telegraph," at the time of her loss as mentioned in the pleadings herein, was the sum of forty-five thousand dollars ($45,000.00).

II.

The court erred in finding and decreeing that the value of said steamship "Telegraph," at the

time of her said loss mentioned in the pleadings, was any sum in excess of twenty-five thousand dollars ($25,000.00).

III.

The court erred in awarding and decreeing to libelant herein, as and for its damage on account of the said loss of said steamship "Telegraph," and as and for her full value at the time of her said loss, the said sum of forty-five thousand dollars ($45,000.00), or any sum in excess of twenty-five thousand dollars ($25,000.00).

IV.

The court erred in finding in this cause, under the testimony therein, that the rule of the market value of said steamship "Telegraph," at the time of her said loss, could not control in finding the amount of libelant's damage herein on account of said loss of said steamship "Telegraph."

V.

Said court erred in awarding or decreeing to said libelant in this cause the said sum of forty-five thousand dollars ($45,000.00), or any sum in excess of twenty-five thousand dollars ($25,000.00).

ARGUMENT.

Market Value Rule.

The main question before the court on this appeal, is the amount libelant is entitled to recover as the value of the "Telegraph" immediately prior to the collision, and this question, must of course, be determined from the competent testimony in the case. Appellee will argue that there was no market for the vessel, or for stern-wheel vessels, and that the "Telegraph" was "in a class by herself," for which reason it should recover the cost of reproducing a vessel like the "Telegraph," less her depreciation. But, as we will show later on, this argument is wholly unsupported by any evidence in this case; while the uncontradicted evidence offered by appellant is that there was such a market; and we will contend that therefore the rule of market value must apply, unless a value is to be fixed arbitrarily, without regard to the evidence in the case, or the law applicable thereto. This, we believe, is the effect of the decision of the trial court, for, after discussing the evidence of market value and also of reconstruction, and characterizing both lines of testimony as of an "unsatisfactory character" (R. p. 356), the trial court went back to

the original cost of the vessel, and, after stating "that no one, much less the court, will be able to state with anything like mathematical accuracy the real value of the 'Telegraph' at the time in question," found her value to be $45,000; which value it stated doubtless would be equally unsatisfactory to both parties. (R. p. 357). This finding, we think, was rather the guess of the court as to "what is right and just between the parties hereto," (R. p. 357) than a finding under the law and the evidence in the case.

We contend that the rule of damages in this case is the same as at common law, where property has been tortiously destroyed, namely, that the wrongdoer is liable for the market value of the property destroyed, before destruction, where it had a market value, unless in special circumstances *where the evidence shows* such market value to be so disproportionate to the actual value to the owner as to make it unjust to compel the owner to take the market value, instead of the special value to him. In this case, appellee does not claim, nor did it introduce any evidence to show, that the "Telegraph" had any such special value to it, which would be so much greater than the market value as to bring it within this exception to the general rule.

But it stands on the sole proposition that the evidence shows that there was no market for the "Telegraph," either because of her class, type or location, and therefore she had no market value; consequently the only way to determine her value is cost of reproduction less depreciation. It will not be disputed that the general rule is as claimed, and if that is true, we take it that the burden is on appellee, as owner of the vessel, to show want of market or market value, before it can claim the benefit of any exception to the general rule.

Spencer on Marine Collisions, Sec. 200, lays down the rule of damages in case of total loss as follows:

> "Restitution is the rule in all cases where repairs are practical, and compensation when loss is total. The measure of damages in case of total loss is the market value of the vessel at the time of the collision, together with its cargo and freight, and such other losses as are a direct result of a collision. The market value of the vessel, and not its real or intrinsic value or cost of construction, is ordinarily the measure of damages. The recovery is limited to market value, and damages in excess of such value may not be assessed by reason of additional value to the owner owing to peculiar fitness for the trade in which it is engaged, or otherwise; nor is the market value to be determined by what the owner would have been willing to take for the vessel, but it is the

> amount for which the vessel would have sold in the open market. The party at fault may not diminish the damages to be assessed against him by showing that the real value of the ship is less than the market value, by reason of its age, the defective nature of its construction, or other causes."

In the present case there is no question of loss of cargo, freight or other losses, except the mere value of the vessel. Spencer in the same section further states that where the conditions are such that no market value can be shown, or where there is no market value, or if such market value is so far disproportionate to the intrinsic value of the vessel as to make it unjust to compel the owner to accept the market value, then other means of determining the value of the vessel may be resorted to, such as the cost of construction, less depreciation. Again, in Sec. 201, Spencer says:

> "The general rule is that the value of the vessel is the open market value at the place where the collision occurred. This has no reference to what it is worth to the owner, or what he would have sold it for, but what it would have brought, offered unreservedly, in the open market. * * * The fact that the actual value of the ship, by reason of age or other cause, is less than the market value will not relieve the party in fault from full payment of the market value of the vessel destroyed. * * * Where from such or other circumstances the price the vessel would have

> brought in the open market is in excess of the amount it would cost to reproduce it, the law affords to the wrongdoer no redress for such excess,—he must pay the full market value. The converse of this rule is true: that the owner of the vessel lost can only recover the market value of the ship, although this may be less than the price paid for it or less than the price of construction."

Roscoe on Damages in Marine Collisions, page 24, states the rule in substantially the same way, and he gives the exception to the rule, as follows:

> "It is obvious that some vessels may have a value peculiar to themselves, having regard to their use, or the position or occupation of the owner. Therefore, if either, owing to the absence of a market, or the particular and special character of her trade or work, the lost ship cannot fairly be valued at a market price, then the basis of the assessment is the value of the vessel to her owners as a *going concern.*" (Italics ours.)

And he cites in support of the exception the case of *The Harmonides*, 9 Asp. 354, which was a case of the loss of the steamship "Waesland" belonging to the Red Star Line, operating upon the Atlantic Ocean. The record in that case shows that at the time of loss, the vessel was on a voyage from Liverpool to Philadelphia with a general cargo and passengers. The evidence also showed that the owner had paid 18,000 pounds for the vessel, had

spent about 50,000 pounds in alterations and repairs to her hull, about 23,000 pounds on her engines and about 18,000 pounds on her cabin accommodations. Evidence was also offered of the yearly earnings of the vessel for her owners, and it appeared that vessels of her kind never came into the market until they were unprofitable or worn out. Under this testimony and the peculiar circumstances of this case, the court held that the market value of the vessel was not a fair test, and it awarded the sum of 31,000 pounds as the value of the vessel before she was lost, a little more than one-fourth her cost to her owners.

In the present case we have an entirely different set of facts. A small, stern-wheel vessel on Puget Sound, which could be operated on any one of the very large number of routes open to vessels of her kind, either on the Sound or on the rivers adjacent to Portland, where she could be and had been taken (R. pp. 126, 145, 179, 195, 297, 300, 313, 314, 343, 348), or on the bay or rivers adjacent to San Francisco, where she could be taken, or on the waters of British Columbia or Alaska, where she could be taken, certainly cannot be compared with a large ocean-going vessel engaged for years in transatlantic business, and being engaged at the very time of her loss in such business.

In MacLachlan's Law of Merchant Shipping, on page 349, the rule is stated as follows:

> "If the vessel becomes a total loss in consequence of the collision, the measure of damages is her market value at the time of her loss; but if she has no market value, then the measure of damage must be fixed by considering what was the value of the vessel to her owners *as a going concern* at the time of her loss." (Italics ours.)

And in support of the exception to the general rule he cites the case of *The Harmonides.*

It will be remembered that in this case there is no evidence of the value of the "Telegraph" "as a going concern." There is no evidence as to what her earnings were, nor that she had any particular or peculiar value to appellee at the time she was lost, because of what she had earned or was capable of earning. The evidence does show that she had been laid up during the previous winter (R. p. 86), and that appellee laid up all of its stern-wheel vessels during the winter season; that the "Telegraph" had been in commission only about three weeks; and the sole claim made by appellee of any special value of the "Telegraph" to it, was on account of its claim that she had such great speed that it could use her in running out its competitors on the Sound, and, as expressed by Mr. Green, president of the appellee

company, breaking such competitors (R. pp. 89, 90). We do not think such an element of value one which will appeal very strongly to the court.

Marsden's Collisions at Sea, 6th ed., page 101, states the rule as follows:

> "If the ship is totally lost, the owner is entitled to recover her market value at the time of the collision; and her value at her home port, and not in the foreign port to which she is taken after collision, is to be taken. Where the ship is of a special construction or character, and, although of special value to her owner, has little or no market value, damages must be estimated by considering what is her value to the owner as a *going concern* at the time she was lost." (Italics ours.) (Citing in support of the exception the case of *The Harmonides.*)
>
> "The value of a vessel lost is what she could have been sold for in the open market in her condition immediately preceding the collision."
>
> 7 *Cyc.* 392.
>
> "It is well settled in this district that the rule of damages is the market value of the vessel at the time and place of her destruction."
>
> *The Utopia,* 16 Fed. 507.
>
> "The vessel being a total loss, her value just before the collision is the measure of damages. The difficulty is to ascertain the value. The criterion is what she would have brought in the market, not under the hammer at a forced sale, but in the ordinary course of sales of such property."

The Colorado, Fed. Cas. No. 3029.

One of the earlier cases on this question, decided by the United States Supreme Court, is the case of *The Baltimore,* 8 Wallace, 377, 386, where the court says:

> "Restitution or compensation is the rule in all cases where repairs are practicable, but if the vessel of the libelants is totally lost, the rule of damage is the market value of the vessel (if the vessel is of a class which has such value) at the time of her destruction."

One of the leading cases on this question is the case of *The Laura Lee,* 24 Fed. 483, where the court discusses at considerable length the reasons for the rule that the market value and not the value to the owners is the measure of damages in case of total loss. The court uses the following language:

> "The libelants insist that the value of their boat was the amount she was worth to them when in their use, and that they are now entitled, in the adjustment of these losses, to have their boat so valued. I do not agree with their method of estimating their loss; it may be, for the sake of this argument, conceded that the libelants rightly considered their boat worth more to them than she would have been to any one else; it may be that her owners would have felt justified in refusing to sell her for what may have been her commercial value at the time of the collision. In adjusting the loss claimed to have been incurred by the libelants,

we must keep in mind the fact that the Greenville is lost to all persons concerned, and that for the purposes of this suit we must consider that no one, more than another, is to blame for her loss; besides, we should consider that in every sale the consent of the owner of the thing sold must be obtained, and that it is often the case that such consent to sell has to be paid for by the purchaser in addition to the sum which may in the market fully represent the value of the thing sold. When the Greenville became a wreck, the power on the part of the libelants to consent to part with her ceased, and the owners of the Lee should not now be required to contribute any sum which represents the amount which the owners of the Greenville might have felt justified in asking from a purchaser for their consent to be deprived of her especial usefulness to them."

"The owner is entitled to have the vessel estimated at its market value at the time of her destruction. His loss is the price it would produce on sale. Claimants cannot overcome that evidence by proving the vessel worth, intrinsically, less money because of her insufficient build, her old age, or the actual state of her timbers."

The New Jersey, Fed. Cas. 10162.

Of course, the converse of the last statement must be true, that an owner cannot claim a value in excess of the reasonable market value, because of the good condition of the timbers or machinery, or because of the speed the vessel might be capable of making. In this case the only testimony offered to

show any special value of this vessel, which would entitle appellee to that special value rather than the market value, is the claim that the vessel was very fast. Even if it were true that this vessel was one of the fastest stern-wheel vessels on Puget Sound, that fact alone would not place the vessel outside the class of vessels having a market value and entitle the owner to recover the special value to it instead of the market value. It would simply increase the market value. So, if the vessel was very slow, appellant could not escape paying the reasonable market value because of that fact alone, but that fact could only be considered in determining what the market value was; and whatever that value was would be the amount appellant would be required to pay, and the only amount appellee would be entitled to recover.

In the case of the *City of Alexandria,* 40 Fed. 697, Judge Brown of the Southern District of New York states the general rule to be that,

> "Upon a total loss by collision, the ordinary rule of damages is the value of the vessel with her net freight upon the pending voyage, and interest from the time of its probable termination, had the loss not occurred."

In that case the "Queen," a dredge of peculiar construction, was sunk and totally lost. The court

found that there was no such market as to establish a market price "for such structure;" but, of course, the "Telegraph" could not be placed in the class of a peculiarly constructed dredge.

In the case of *The Hamilton,* 95 Fed. 844, Judge Thomas of the Eastern District of New York states the rule as follows:

> "The rule relating to the injury of personal property on land is that the value of the property, if totally destroyed or injured beyond profitable repair, is recoverable with interest; but if the property be injured, but be capable of economical restoration, compensation for its diminished value and for loss of its use is recoverable. The same rule applies to ships injured or destroyed. * * * The law does not consider that the sunken ship is incapable of replacement. It rather considers that ships are commodities bought and sold in the market, and that one may be purchased to take the place of one lost."

> "The vessel here was a total loss. The rule of damage is the market value of the vessel (if it is of a class which has a market value) at the time of her destruction. *The Baltimore,* 8 Wall. 386, 16 L. Ed. 463; *The Granite State,* 3 Wall. 313, 16 L. Ed. 179. The measure of damages is the value of the vessel in its condition just prior to the collision, to be measured by its market value, and not by the price for which the owners would be willing to sell it, or may have paid for it. The party in fault cannot reduce the amount recoverable by showing

that the lost vessel was worth intrinsically less than its market value."

The Mobila, 147 Fed. 882.

"If the injuries were such as amount to a total loss, the rule of damage is her market value at the time of her destruction, if she has any market value (citing authorities). In ascertaining the market value of a vessel destroyed in a collision, the best evidence is, in general, the evidence of competent persons, who knew the vessel, and the state of the market, and who testify as to its market value."

The Lucile, 169 Fed. 719.

See also *The Frank Hall*, 128 Fed. 815.

We think the foregoing authorities settle the rule beyond question as we contend. Nor do we think anything in the cases which have been cited by appellee in the court below tends in any way to sustain a different rule. The case of *Wetmore vs. The Granite State*, 70 U. S. 214; 3 Wall. 314, was not a case of a total loss, and all that was said in the opinion relative to the market value was mere obiter. That case has been cited repeatedly as sustaining the rule we contend for, and it certainly cannot be construed as an authority that vessels have no market value at all. All that the court meant in a quotation which will be referred to by appellee, was that vessels do not have an established market value, such as grain, cotton or stock.

This, of course, is true of various other kinds of property, to which unquestionably the rule of market value applies when they are taken or destroyed.

Another case which will be referred to by appellee, is the case of *The H. F. Dimock,* 77 Fed. 226. That case was decided by the Court of Appeals for the 1st Circuit, and involved the loss of the private yacht "Alva," belonging to William K. Vanderbilt. It was claimed in that case by libelant that because of the character of this yacht, and the fact that the only purchasers for a vessel of that kind would be men of great wealth, who happened to desire a pleasure yacht and would be willing to buy such a vessel at a fair price, there was no market for the vessel, and that therefore libelant was entitled to recover the cost of reproducing such a vessel, less whatever her depreciation might be. The evidence showed that the vessel cost from $380,000 to $400,000, and that libelant would not have sold the vessel for less than $275,000 to $300,000. The court discussed at great length different classes of property and measures of values for these different classes. It divided these classes into four sub-divisions: The first being such as family portraits, heirlooms, etc., upon which no market value could be placed, and as to that class held that the just rule of damages is the actual value to the owner,

taking into consideration the cost, practicability, and expense of replacing it, and such other considerations as in the particular case affected the value to the owner. Of course, it did not place the "Alva" in this class. In the second class it placed property which should be valued merely as property, and not because of any peculiar value to the owner, but where the rule of the market value would either be unjust or impracticable or impossible to apply. It did not place the "Alva" in this class. The third sub-division made, is the great class of property which has a recognized market value. And the fourth class includes property which, while not having a recognized market value, nevertheless, has actual property value, as distinguished from any particular value to the owner, which was to be considered in determining the value.

The court stated, "It cannot be questioned that the yacht in controversy here was 'marketable property' in the general sense of the term." The court then proceeded to distinguish the yacht in question from the property included in the first three sub-divisions mentioned, and placed the yacht in the fourth class along with such property as "dwellings of more than mere moderate cost, erected away from actual centers of thickly settled cities, and much

other property acquired for domestic or personal uses," and then held that to fix the value of this character of property by the market value would work an injustice, that other things should be considered in determining the value.

The court said, "It is still the pecuniary interest which is to be valued," and held that even in cases of a pleasure yacht like the "Alva" "one inquiry of practical value would be, what amount any person of sufficient means, desiring to acquire a yacht of her size and character, or any other property of a special kind, might reasonably be expected to be willing to pay for the same, rather than incur the cost of a new structure, considering, nevertheless, the inducements to secure the new, by reason of the probable improvements and the other advantages which the new offers." Considering all the elements proper to be considered in determining the value of this special kind of vessel, used only for pleasure by a very limited class of people, instead of commercially by a large class, the court sustained a finding of $191,000.00 value, or about *one-half its cost.*

Certainly, the "Telegraph," a small, stern-wheel vessel, operating for years on inland waters, where there are many routes upon which she could

be used, all of which are open to any one wishing to place a vessel upon them, cannot be compared to a private yacht built for a multi-millionaire at enormous cost. If the "Telegraph" had any great value on account of her speed or peculiar construction, or for any other reason, she had this value for a purchaser as well as for appellee. No exception to the general rule is furnished, merely because the owner of the property destroyed, through its money, business sagacity, or even the use of such vessels as the "Telegraph" in "breaking" its competitors, may have acquired a practical monopoly of the best steamship runs on the waters where the vessel has been operated. There is nothing to prevent other persons using these same means to compete with, and even "break" appellee, and use the "Telegraph" for that purpose. if she had such great speed and was of such great value for this purpose; and we have no doubt that if the "Telegraph" was such a fast vessel as appellee claims, and therefore of such great value in monopolizing or retaining a monopoly of these various runs on Puget Sound, her greatest value to appellee was to hold and prevent some one else getting her and attempting to break up its monopoly. However, even if this were the fact, which we do not concede, it would not furnish any legal reason for compelling appellant in

this case to pay any such fanciful or excessive value for the vessel, because it was unfortunate enough to sink her.

The case of the *Conqueror,* 166 U. S. 110, which will be cited by appellee, is not an authority in any sense upon the question here. In that case Mr. Vanderbilt was suing for damages for detention of his private yacht, and on the question of *demurrage* the Supreme Court said:

> "The best evidence of damage suffered by detention is the sum for which vessels of the same size and class can be chartered in the market. Obviously, however, this criterion cannot often be applied, as it is only in the larger ports that there can be said to be a market price for *the use* of vessels, particularly if there be any peculiarity in their construction which limits their employment to a single purpose." (Italics ours.)

The court goes further and shows what is the correct measure of damage where no market value can be determined, and states the rule as follows:

> "In the absence of such market value, the value of her use *to her owner in the business in which she was engaged at the time of the collision* is a proper basis for estimating damages for detention, and the books of the owner showing her earnings about the time of her collision are competent evidence of her probable earnings during the time of her detention."

The court, by this language, recognizes that it is not some fanciful or imaginary value to the owner which forms the basis of the measure of damage, either for detention or for loss, but it is the value to the owner as a going concern capable of earning money for him which is to determine in the absence of a market value. In this case, as we have said before, there is not a word of evidence to show that the vessel had any value to her owner from an earning standpoint, nor any value which she would not have equally to any one else. Nor does the case of the *Conqueror* hold, as proctor for appellee has contended, that Seattle is not one of the "larger ports" where there would be a market for vessels which could be used upon the waters tributary to that port.

We think the court will be satisfied that our statement of the law relative to the measure of damages is correct; and that it will only inquire whether or not the evidence in the case brings appellee within any exception to that rule, so as to make the rule of market value inapplicable.

EVIDENCE OF MARKET VALUE.

As stated by the trial court in its memorandum decision (R. p. 352), appellee concedes that if the evidence shows that the "Telegraph" had a market value at the time of her loss, such value would be the measure of recovery in this case. We believe, however, under the authorities above referred to, that the correct rule is, that presumptively there was a market for the vessel, and that she had a market value; and before appellee could claim a value based upon other evidence than market value, or the court could find a value upon any other basis, appellee must show by a fair preponderance of competent testimony, that there was no market for the vessel, and therefore she had no market value.

Appellee alleged in its libel that the "Telegraph" "immediately prior to the time of said collision, was of the value of fifty-five thousand dollars." (R. p. 7.) There is no allegation that this "value" was any special value to appellee, or other than such value as is ordinarily recoverable where property is destroyed, to-wit: market value. In taking its testimony, appellee wholly ignored the question of market value, and proceeded over appellant's repeated objections (R. pp. 13, 14, 18, 19,

20, 21, 29, 30, 32, 38, 40, 45, 49, 51, 54, 56, 72, 82, 84, 112), to offer evidence of the original cost of the vessel, and also *ex parte* bids for building a vessel which it claimed would be like the "Telegraph" in build and speed. If it were justified in thus peremptorily setting aside the well established rule of market value, still it offered no evidence which would support a finding under the "going concern" rule so clearly stated by the authorities cited, as the basis of values in the absence of a market value, although, if the "Telegraph" had a "going concern" value, the facts necessary to show it were peculiarly within the control of appellee.

Until after appellant had made its objections to this testimony, as not furnishing a proper basis for assessing damages in this case, appellee did not offer a particle of evidence that there was no market for the "Telegraph," so as to come within the exceptions to the general rule. And all the evidence ever offered by appellee on the question of market or market value for the vessel is the following:

Capt. H. B. Lovejoy, one of appellee's witnesses, was asked the following questions, to which he answered as follows:

"Q. Is there any market, Captain, for steamboats? Can you put them on the market the same as you can a horse?

MR. MERRITT: I object as incompetent, irrelevant and immaterial, and the witness has not shown himself qualified to testify.

A. No, you cannot.

Q. You have testified that you are familiar with the steamboat business on Puget Sound, haven't you?

A. Yes, sir.

Q. And particularly with that class of vessels?

A. Yes, we have one.

Q. You say there is not any market?

MR. MERRITT: I renew my last objections.

A. I would not think there was any regular market for a boat. I can illustrate that about the "Vashonian;" that cost twenty thousand dollars and sold for something like thirty-five hundred dollars two years ago. The boat was worth the money, but they did not have a run for her. I could not use her on my run, for instance, and I would not think you could figure on a market for a boat unless there was a place for it."

The witness was manager of a small line of Sound vessels, but was not and never had been in the business of dealing in vessels, and did not pretend to know anything about the demand for vessels like the "Telegraph" where she could be taken or used (R. p. 77). His example of the sale of the "Vashonian," a vessel which had been sunk for some time (R. pp. 79-80), would hardly have much weight in showing there was no market for a vessel like the "Telegraph" afloat.

The only other testimony ever offered by appellee on either of these questions was the following question asked of Mr. Green, president of the appellee company, to which he answered as follows (R. p. 84):

"Q. Is there a general market for vessels on Puget Sound or any other place?

A. No. A vessel is a liability if you haven't a route to put her on. She is far from an asset. She will cost you money to keep up. She makes no earnings unless you have a route for her."

The witness had not shown himself competent in any sense to answer the question, and such testimony could have no bearing upon or weight in determining the question of market for or market value of the "Telegraph," and our motion to strike the answer, we think, was well taken (R. p. 84). If the witness' answer is correct, then there is no market *anywhere for vessels of any kind,* and the rule of market value could *never* be applied to vessels, and all the decisions we have referred to were made upon an entirely wrong basis. We hardly think the court will so hold.

On the other hand, appellant offered the testimony of a number of very competent witnesses to the effect that there was a market for the "Telegraph" at the time and place of her loss; and also as to what her market value then was.

Captain Gilmore H. Parker, a master on Puget Sound for over 30 years (R. p. 125) and for some time master of the "Telegraph," testified that she could have been taken to and used on other waters than Puget Sound (R. p. 132).

Captain Charles E. Wilson had been a master mariner since 1882, a resident of Seattle since 1890, and engaged in the business of buying and selling vessels at Seattle for nine years (R. p. 144). He knew of many sales of stern-wheel vessels, has sold a great many other vessels, and was more familiar than any other witness with the market and demand for vessels of all kinds at Seattle. He testified that the "Telegraph" could have been taken to and used at other places along the coast than Puget Sound; and that in his opinion there was a market for the "Telegraph" when she was sunk. It is true that he testified that the "Telegraph" was "obsolete and out of date," and that there had not been as many transfers of stern-wheel vessels as of other boats, but certainly that fact does not prove that there was no market for a vessel like the "Telegraph;" it merely shows that, like any other old or out-of-date piece of property, the demand for such a vessel was not as great, nor the market price, compared with cost of construction, as high as for more modern and practical vessels.

Appellee appreciates the force of Capt. Wilson's testimony, which it did not even attempt to dispute; but it has sought to weaken its effect by reference to him as "Cyclone" Wilson, a name some people on the waterfront called him. However, we believe the court will be satisfied after reading Capt. Wilson's testimony (R. pp. 144-172) that he knew what he was talking about; and the many sales of vessels referred to by him, which are undisputed, show that the general rule should apply in this case.

Witness Geo. N. Skinner, who had been engaged in the shipping business many years, testified that the "Telegraph" could have been taken to and used upon any of the inland waters along the coast (R. pp. 178-180). He testified that in his opinion there was a market for her; that he himself had tried to buy her since she was raised (R. p. 181); and she had been offered to him, rebuilt, and in as good condition as it was possible to put her in, for $19,000.00 (R. p. 182).

Capt. S. B. Gibbs, master mariner and for eleven years agent and surveyor for the San Francisco Board of Marine Underwriters at Seattle, testified on this question. He knew the "Telegraph," knew where she could have been used, and was par-

ticularly familiar with shipping and vessels on the coast. He gave instances of sales of other similar vessels, testified that in his opinion there was a market for the "Telegraph;" that he had sold even the wreck, and that her market value was $25,000 (R. pp. 193-200). Appellee will claim that Capt. Gibbs' information of other sales was hearsay, but that is true of nearly all information of other sales, which information qualifies a witness to testify on these questions. But it will be remembered that appellee did not attempt to disprove the testimony concerning other sales given by any of appellant's witnesses.

Capt. T. W. Spencer, of Portland, testified to a voluntary sale of his stern-wheel vessel the "Spencer," about one year before the "Telegraph" sunk, for $25,000. The "Spencer" was larger and faster than, and about the same age as, the "Telegraph," and was then in very good condition (R. pp. 297-298.)

C. W. Cook, Pacific Coast manager of the American-Hawaiian Steamship Company, at San Francisco, formerly of Seattle, knew the "Telegraph," and testified concerning sales of other similar vessels, and also that a large number of other similar vessels had been taken to different places

along the Coast, which had been and could be done with the "Telegraph" (R. pp. 313-318).

Joseph Supple, a ship builder at Portland, Oregon, for 25 years, testified that the "Telegraph" could have been taken "anywhere on the Pacific Coast or to Alaska" (R. p. 348), and in answer to the following question: "State, if you know, whether or not there was at the time and place the 'Telegraph' was sunk a market for said vessel and vessels of her kind and type" (R. p. 328), he testified:

"There was, at the time and place the 'Telegraph' sunk, a market for stern-wheel vessels of normal, practical type, that could be used for towboats or freight boats or passenger boats, or all combined. There was then a ready sale at fair prices for such boats. The 'Telegraph' was a peculiar type of boat, built only for passengers and not fit for towing or carrying freight. The demand for her would be best for a strictly passenger run. In my opinion, if she had been offered for sale before she was sunk she could have been sold at some price, but not for as much in proportion to her cost as a stern-wheel boat of more practical type."

Mr. Supple was one of the "responsible builders" (R. p. 84) from whom Mr. Green obtained bids for reproducing the "Telegraph," and was certainly one of the best qualified of men to know whether or not there was a market for her. On cross-examination this witness testified that "Stern-

wheel vessels are being bought and sold all the time and new ones are being constructed on the coast" (R. p. 350).

Marcus Talbot, general manager for the Port of Portland Commission, testified for appellant on this question. He was especially well qualified to testify, having been engaged in shipping at Portland and Seattle for many years (R. pp. 338-339). He knew the "Telegraph;" had bought and sold stern-wheel vessels where she could be taken and used, and knew of others having been bought and sold there (R. pp. 332-339). He stated positively that at the time the "Telegraph" was sunk there was a market for her at Seattle (R. pp. 333, 339); and in answer to a cross-interrogatory gave the names of a number of stern-wheel vessels which had been sold within a short time previous (R. p. 341).

In the face of this evidence, which stands undisputed, from witnesses of such high standing and wholly disinterested, we fail to see how appellee sustained the burden upon it of showing there was no market for the "Telegraph," by the mere general statements of its two witnesses above referred to, even if their testimony was competent; and it would seem to us that the court must be satisfied that there was such a market.

Appellee did not offer any evidence of the market value of the "Telegraph," either to show that she had no market value, or that if so, it was disproportionate to her intrinsic value. On the other hand, a number of appellant's witnesses testified as to her market value at the time and place she was lost. Capt. Wilson placed her market value at $16,000 (R. p. 146). Mr. Skinner had tried to buy her after she was raised, and she had been offered to him rebuilt and put in good condition for $19,000 (R. p. 181-182). Capt. Gibbs placed her market value at $25,000 (R. p. 194). Mr. Cook placed it at $20,000 (R. p. 315). Mr. Talbot placed it at not to exceed $25,000 (R. p. 339).

Besides the opinions of these very competent witnesses on this question, we have for comparison, the prices at which other similar vessels had been sold in the market which was open to the "Telegraph." In the first place, we have the sale of the "Telegraph" herself. Appellee purchased the "Telegraph" and "City of Everett' and the route upon which they were being operated for $55,000.00 in the fall of 1910, about a year and a half before she was sunk (R. pp. 58, 91, 96). The "City of Everett" cost about $42,000 to build about a year before the "Telegraph" was built, was in good condition when sold and, according to Capt. Scott, who

sold the boats, was worth more than half as much as the "Telegraph" (R. p. 59). But appellee had both vessels insured upon approximately the same value (R. pp. 95, 143). The "Cochrane," a larger and better boat sold for $8,000 (R. p. 152); the "Greyhound" for $4,200; the "Nunivak" for about $15,000 (R. p. 153); the "Telephone," a larger and better boat built by the builder of the "Telegraph" (R. p. 65), was sold for $24,500 or $24,800 (R. pp. 199, 318, 341); the "Spencer," also a larger and faster boat, was sold for $25,000 (R. pp. 297-298); the "Ocean Wave" for $10,000 (R. pp. 314, 316); the "North Pacific" for $10,000 (R. p. 315); the "State of Washington" for $17,000 (R. p. 341); the "Capitol City" for $17,000 (R. p. 341).

The testimony concerning these sales is undisputed; nor is there any dispute that many of these vessels were larger, better, more powerful and in the case of the "Telephone" and "Spencer," at least, faster than the "Telegraph." When the court compares these vessels with the "Telegraph" as shown by the evidence, and considers the price at which they were voluntarily sold, we think it will feel that the market value of $20,000 to $25,000 placed on the "Telegraph" by appellant's witnesses is very liberal.

Appellee did not attempt to dispute this evidence, but contented itself with trying to show some reason why it should not take in this case a sum proportionate to what it paid for the vessel and valued her for insurance purposes, and what owners of other similar vessels had been willing to sell for.

It did not offer a word of evidence as to the "Telegraph's" earnings; it did not show her charter value; it did not claim it had any special need for her, it did not dispute the testimony of appellant's witnesses that she was out of date for a passenger vessel, about the only use which could be made of her, and that it was replacing its stern-wheel vessels with modern, iron, propeller vessels (R. pp. 133, 146, 160, 181, 186, 204, 314, 316, 318, 348). On the other hand Mr. Green admitted that the "Telegraph" and all the company's stern-wheel vessels are laid up during the winter months and that she had been in commission only about three weeks before she was sunk (R. p. 85).

In fact, appellee's sole claim of a special value for the "Telegraph" was that she was very fast; Mr. Green, without showing any knowledge of the matter whatever, even went so far, in his zeal to recover a large value for this old, out-of-date boat, as to testify that "She was the fastest stern-wheeler in

the world; that has never been disputed" (R. p. 83). That this statement is wholly incorrect, we refer the court to the undisputed testimony of appellant's witnesses, that at least the "Telephone," the "Spencer," the "H. J. Cochrane," and the "Bailey Gatzert," all stern-wheel vessels, were faster, having actually raced with and beaten the "Telegraph" (R. pp. 127, 131, 151, 152, 297, 298, 300, 303, 315, 339, 342, 343, 347). While we do not think if appellee's claim that the "Telegraph" was such a fast *stern-wheel* vessel, or even if she was the *fastest* stern-wheel vessel on the coast, that would place her "in a class by herself," so as to entitle appellee to recover a value higher or different from her market value; but that fact would only affect her market value, just as the fact that a vessel was very slow would not entitle one destroying her to pay less than her market value. But as we have shown, this claim of appellee is not only not proven in this case, but it is conclusively shown that other stern-wheel vessels on this coast, larger, more practical and better in every way, were also faster; and had been sold in the market for less than half what appellee asks for the "Telegraph" in this case.

Appellee has argued, and will probably argue here, that a market exists at a certain time and place

for a given article, only when other similar articles are shown to have been openly and generally sold *at that time and place.* It has the idea that there is no market at a given place for a *moveable* article, unless it is shown that there are persons *at that place* who would have a use for the article *there,* and that such persons have purchased similar articles *at that time and place* for use *there.* This might, to a certain extent only, be true concerning immovable property, which could be used only where it lay. But it cannot be true of *moveable* property which can be taken elsewhere and used.

In the case of real estate, of course, if there is no demand for its use where it is, it could not be said to have a market value. For instance, the richest agricultural land in central Alaska would have no market value. But suppose cattle were raised on this land, where there was no one to use them, but persons living elsewhere could take them where they could be used, would they not have a market value *where they were raised,* the amount of such market value depending on the cost of taking the cattle where they could be used, and their value at that place? Nor would the fact that cattle were never before raised or sold at that place or taken from there, prove, as appellee would claim that they had no market value there.

Suppose such cattle were destroyed where raised and neither their owner nor any one else had any personal use for them there, could such owner recover the cost of raising other cattle there, instead of what the cattle would have been worth to one taking them where they could be sold and used?

To establish a market and market value, it seems to us all that need be shown is that the commodity in question is such as is used and bought and sold commercially; having a value as property only; that others in the same business as the owner use such commodities and sometimes go into the market to buy them; and that this particular commodity is so located that such other persons could know it was for sale and, having purchased it, could use it there or take it where it could be used. And in this case, even if appellee's claim were true, which neither the evidence proves, nor common knowledge sustains, that there was not a person at Seattle or on Puget Sound who had or could find use for the "Telegraph," or would have purchased her if offered for sale; nevertheless, because vessels like her are used on other waters along the coast, where she could be taken and used, and other similar vessels are being bought and sold and constructed for use on such waters, therefore there was a market

for the "Telegraph" when and where she was lost. But, of course, the claim that no one on Puget Sound could or would have bought or used her is not correct in fact, nor based on any evidence in the case; but is mere argument to try to sustain a claim for an excessive value for the vessel. In fact, our evidence shows that more than one party wanted to buy her there and even the wreck was sold there (R. pp. 181, 196, 197).

Nor is appellee's argument that there was no market shown, because frequent, recent sales of vessels were not shown, any more sound. It is not the *frequency* of sales of property which determines whether or not it has a market value. Suppose a railroad was to condemn real estate in a community where not a piece of real property has been bought or sold for years, although it was all in actual use by persons who had not cared to sell, would not its market value, as shown by competent witnesses, be the measure of damages for the taking?

Take another case, suppose a very valuable race horse was killed while being carried on a railroad. Similar horses might not have been bought or sold for many years, but could the owner therefore, show the great time, labor, expense, etc., of raising, and uncertainty of being able to raise, another horse

like it, to show its value; or would the opinion of dealers in race horses as to its market value, be proper in a suit for its loss? Or suppose similar horses had been frequently bought and sold in New York, so that the market value if killed there would govern, would a different rule apply, if the horse was killed while being carried across the deserts of Nevada, where the horse could not be used and no such horse had ever been bought or sold?

It seems to us that these examples show the unsoundness of appellee's argument in this case, which, as we have stated before, is not based upon any evidence in the case, but is contrary to the positive testimony of competent, disinterested witnesses for appellant.

Appellee's argument at most, shows that the market value of the "Telegraph" was not as great, in proportion to her cost, as it would have been if she had been a more modern, up-to-date or different vessel; but does not show that the general rule does not or should not apply. If appellee's argument is correct, all one need to show, in order to recover many times what a commercial article is worth to others using or desiring such an article, would be that articles like his had not been frequently and recently sold where his was destroyed; although the

only reason might be that his article was so much out of date, or of so little practical use, as not to have any great value to the owner or any one else.

It must not be forgotten that the "Telegraph" was used, and could only be used for commercial purposes, and that the sole value to appellee or any one else, was her earning capacity. Nor will the court overlook the undisputed evidence that she was built almost solely for speed and carrying passengers, having little freight carrying capacity, and not as practical as other vessels for towing; also the undisputed fact that she was out of date for carrying passengers, being laid up during the winter months, while a different class of vessels was being rapidly constructed to handle the passenger business on Puget Sound.

Captain Scott, her builder, on his direct examination, was asked the question, "Was she designed and built for speed?" And answered, "Yes, entirely for speed; passenger boat" (R. p. 55). And he testified how he had spent "nights and Sundays" thinking how to get that speed in a stern-wheel vessel (R. p. 70).

Mr. Green testified that "The steamer had been laid up during the winter months as usual, our stern-wheel steamers are usually laid up," (R. p.

86); and he testified that her value to appellee was "for this reason, the 'Telegraph' was very fast. When we have opposition on any of our runs we need an implement like the 'Telegraph' to offset the opposition. We can beat any other steamer that comes against us with the 'Telegraph'. We used her for that and she is valuable for that purpose" (R. p. 89). He said they used her on one route "until we broke our competitors, and then took her off" (R. p. 90); but admitted that she was taken off this route because "we found that there was very shallow water there and she did not handle very well and we put on another boat. *We have two or three boats of that style to be used for that purpose"* (R. p. 90). He admitted that they "never ran the 'Telegraph' at twenty miles an hour on her commercial speed; we ran her about eighteen miles" (R. p. 114).

Captain Parker, Master of the "Telegraph" for a long time, testified that she was built largely for carrying passengers and did not have much freight capacity (R. p. 131). He also testified that vessels like the "Telegraph" are not now being built and used on the Sound runs; that "Captain Green is building a different class of boats now." "Iron and steel boats, rather, propellers," which are tak-

ing the place of the old stern-wheelers (R. p. 133); that the only value she would have as a passenger boat "would be to reserve her as an extra to take another's place occasionally, on runs like Seattle and Tacoma, and over to Bremerton or Olympia" (R. p. 140); and that if a run was already occupied "the old 'Telegraph' could not go on that run and make anything at all," because she was not equipped to take business from boats already on a line (R. p. 141).

Captain Wilson testified that "vessels of that class I would say are obsolete and out of date" (R. p. 146). That stern-wheel vessels can be used as tow boats, "But since the competition in towing with boats of the propeller type they have not been in much demand" (R. p. 150). He also testified that the "Telegraph" was a "freak" boat (R. pp. 156, 165); and that such vessels as these are out of class on Puget Sound. "On some rivers they use them. On the shallow rivers they are the best, but they are usually lighter draft. Now, then, there is a lot of real value in them, like an old automobile; they give good service, yet you can buy them for almost nothing. They are out of date, and there are not many people who desire that kind of an old vehicle or steamboat" (R. p. 160).

Mr. Skinner testified that stern-wheel vessels are out of date on the Sound (R. p. 181); that "Mr. Green is getting rid of that class of boats. He is building an entirely different class of vessels, building as rapidly as he can to cover the different routes, and I would assume that that class of vessels is not of the class that he wants" (R. p. 185).

Captain Gibbs testified that he did not think the "Telegraph" practical for carrying freight or towing; that she was built principally for speed and passenger trade (R. p. 194); and that appellee is constructing new, iron, propeller boats to put on its Sound routes (R. p. 204).

Captain McDonald, a witness for appellee, testified that the "Telegraph" was "hard to steer. Very few men can steer her, on the Sound. She is apt to travel three miles out of every twenty winding around the Sound trying to steer her," that she was "The hardest thing I ever got hold of to steer" (R. p. 254).

Mr. Cook testified that when he left Seattle in 1906 "steamboat owners were going in for the more modern screw boats" (R. p. 314); and that "The 'Telegraph' was built in 1903 for carrying passengers between Everett and Seattle, where there was

then no very strong competition. Since that time an electric railway has been completed between these two cities and any other run for which the 'Telegraph' was suited has been covered by more modern steamers" (R. p. 318).

The evidence shows that the "Telegraph" had been taken to Portland and operated for several years on the rivers there, but was returned to her old run on the Sound. The record does not show why she did not remain at Portland, but does show that other stern-wheel vessels there were faster, and that she had little capacity for freight; and we can properly assume that she was not a profitable boat to operate at Portland, where stern-wheel vessels are especially useful. As stated by Mr. Talbott, "she could not have as great a value as other stern-wheel vessels of equal cost and in the same condition, but which were built for all around purposes" (R. p. 340).

Mr. Supple testified that "the 'Telegraph' was a peculiar type of boat, built only for passengers and not fit for towing or carrying freight. The demand for her would be best for a strictly passenger run." Also that, although he had built at least fifty stern-wheel vessels, "the 'Telegraph' was a different type than any I have built. She was built

for speed and passengers. She was not a practical vessel for the river runs. If she had been a more practical type of stern-wheel vessel, in my opinion she would have had a much greater value" (R. p. 349).

None of this testimony was disputed by appellee, and, therefore, the court is called upon to fix the value of a *peculiar and impractical type* of an *out of date* class of vessels, which could not, as stated by these witnesses, have the value of a more practical type of the same class of vessels.

Appellee will, of course, argue that this testimony shows there was no market for the "Telegraph," and therefore, the rule of market value cannot apply. But no authority can be found to sustain such a rule, nor is it reasonable or just. As well might it be claimed that the rule of market value did not apply in case of loss of an old, out of date automobile, because few such machines are bought or sold, and there is little demand for them; therefore, that the cost of building a new machine *like the old one,* less its physical depreciation, which might be very small, should be the measure of recovery. If that was correct, the owner of such an old, out of date machine, if in good repair, could recover more for its loss, than could the owner of a

late model having every modern convenience and appliance. We submit this is neither justice nor good law.

We do not mean to say that the "Telegraph" was useless or of no value; but we do claim that the mere fact that she was fast among her class of vessels, and fitted for passenger service only, does not deprive her of her character as marketable property, the value of which is to be determined by what she was worth in the market; especially when she was in a place where hundreds of such vessels could be used, where other similar vessels have been bought and sold, have been and are being constructed, and have been and are being used. Any argument which attempts to place the "Telegraph" in a class that would have no market value at Seattle, simply shows her *lower value,* instead of justifying a finding of value based upon the cost of reproducing a similar vessel. There is no claim on the part of appellee that it ever intended or desired to build another vessel like the "Telegraph"; but it stands undenied that such vessels are being replaced, even by appellee itself, by different, more modern and more practical vessels.

APPELLEE'S EVIDENCE OF VALUE.

Contending, solely because of its claim of this excessive speed of the "Telegraph," that it is entitled to recover a value based on other grounds than her market value, appellee proceeded to offer evidence to prove such other value. This evidence was the cost of building a vessel which it claimed would be a duplicate of the "Telegraph" in build and speed, also original cost of the "Telegraph," and her physical depreciation.

The trial court refused to accept the evidence of cost of reproduction, "as a fair guide to the determination of the award to be made"; and characterized it as of an "unsatisfactory character" (R. pp. 355, 356). At the same time the trial court admitted that it was influenced by this evidence (R. p. 354).

We think this evidence was not only "unsatisfactory," but entirely incompetent; that its admission before a jury would have been error, and, as appellant at all times objected to it (R. p. 354), it should have been and should now be, entirely disregarded by the court.

The first witness called by appellee as to cost of reconstruction, was Mr. Frank Walker, a marine

surveyor, naval architect and consulting engineer. Over appellant's objection he testified that it would cost $75,000 to $80,000 "to build the steamer "Telegraph" at the present time, as a new vessel, reproducing her both as to dimensions and form and so forth, *and also as to speed"* (R. p. 19). He did not testify as to having built any such vessel, or that he knew of any such vessel having been built; and when asked to give the cost of different parts of such a vessel, not only could not give an estimate of the cost of such parts, but *flatly refused to try to do so.* Sufficient in itself to discredit his previous testimony (R. pp. 23-27). Certainly, testimony as to a lump sum for the cost of construction of a vessel can have very little weight, where the witness cannot even give an estimate of the cost of different substantial parts of the vessel. It is very evident, however, that Mr. Walker's testimony was based solely upon the bids hereafter referred to, and it certainly contemplated a stern-wheel vessel capable of making twenty miles per hour, which we feel satisfied the court will find from the evidence the "Telegraph" could not make.

Mr. Green, president of appellee company, testified that he undertook to get estimates from steamboat builders on Puget Sound and at Portland for

the replacement of the "Telegraph," and, over appellant's objection, testified that these estimates ranged from $80,000 to $100,000 (R. pp. 82-83). He stated that all of these estimates were for a stern-wheel vessel guaranteed to make twenty miles per hour, sustained speed, which he admitted was an almost impossible condition (R. pp. 91-92, 113-117). The bidders were not furnished any specifications of the vessel or her equipment (R. p. 92), and in most cases, at least, Mr. Green merely orally requested such bids (R. p. 113). The bids were all general in terms, and in every case based upon a guaranteed speed of twenty miles (R. p. 113. Claimant's exhibits 1, 2, 3, 4 and 5 and B, R. pp. 258-268, 288). We do not wonder that the trial court considered this evidence "unsatisfactory," and it would seem to us unnecessary to cite any authority to show that it was wholly incompetent. It is the first time we ever heard a claim made that such evidence is proper. Mr. Green, without appellant's knowledge, asked certain parties to tell him what they would reproduce the "Telegraph" for, guaranteeing a sustained speed of twenty miles, and he received certain general offers, not based on any specifications, but expressly based upon a guaranty of an almost impossible speed, and testified as to the range of these estimates. Appellant could not cross-

examine the parties receiving this request and giving these estimates; and neither it nor the court knows what considerations entered into the amount of these tenders. Appellee might have called the parties making these bids, as witnesses, as they were all available; but it did not do so, except Capt. Lovejoy, and two parties who had made estimates, upon which they supposed the subsequent bids were based.

Capt. Lovejoy, whose bid (Ex. B, R. p. 288), was $86,500, admitted that he had no specifications upon which to base his bid; made his estimate "by comparison, principally," from his general knowledge of the "Telegraph"; he did not intend it as an absolute offer, but it was only "a pretty safe estimate," "subject to approval of the specifications"; and that when he got the specifications his bid "might be lower, you could not tell"; that this offer was a "rough estimate" of the cost of such a vessel (R. pp. 77, 78). He also admitted that this price was higher on account of the guaranty of speed required (R. p. 79).

W. S. Mathewson, estimator for the Seattle Construction & Dry Dock Company, one of the bidders, was called as a witness for appellee. He did not make the bid for that Company, and did not have any specifications of the vessel, except the

surveyors' specifications for *repairs after she was raised* (R. pp. 33, 100, Claimant's Ex. 6, R. p. 268, etc.); he simply estimated, from these repair specifications, and his recollection of the vessel from being aboard her *after she was raised* (R. p. 34), what it would cost to build a vessel "about as good as the 'Telegraph' " (R. p. 32). He did not remember what his estimate was (R. p. 103), but thought it was between $65,000 and $70,000 (R. p. 104), while that company's bid was $92,400 (R. p. 287). At the time he testified he had no sufficient recollection of the vessel, nor of his estimate for her reconstruction, to more than guess at the cost of the different parts of the vessel (R. pp. 104-109). His testimony certainly can have no weight, nor do we think it competent.

Mr. Simen, superintendent of the Heffernan Engine Works, which bid $79,600 for constructing a vessel similar to the "Telegraph," testified for appellee. He had only the repair specifications and his recollection of the vessel from his inspection of the wreck, to base his estimate upon (R. pp. 52, 118, 119). He did not make the bid, which was $3,000 more than his estimate (R. pp. 119-120). His recollection was that he estimated the cost of the the machinery at $41,000 (R. p. 120); while Mr.

Mathewson, guessed the cost of the engine and parts to be about $10,000 and boilers at from $9,000 to $12,000 or $22,000 for all machinery (R. p. 106); while Capt. Scott, who built the "Telegraph," testified it cost about $12,000 to take out the old engines, buy and install the new ones (R. p. 60). Mr. Simen estimated the cost of the hull at $33,000 (R. p. 120), while Capt. Scott testified it cost about $15,000 (R. p. 59).

One of the bids received by appellee and testified to by Mr. Green, was a bid by Mr. Supple of Portland for the sum of $72,500 (R. p. 258, etc.). This bid is the most detailed of any, but it was based upon and contained a guaranty of a speed of twenty miles per hour (R. p. 262). Mr. Supple's deposition was afterwards taken in behalf of appellant, to show the market for vessels like the "Telegraph," and he then testified "I could build as good a boat as the 'Telegraph' was when new for $55,000, although my bid was for $72,000, but I included in that bid about $20,000 on account of the twenty-mile guaranty required" (R. p. 349).

The other evidence offered by appellee on this question was the testimony of Fred A. Ballar, a naval architect from Portland, and consulting engineer for appellee (R. p. 47). He had been on the

"Telegraph" only twice in two years before she sank, and had not investigated her for over two years (R. p. 41); yet from what he saw of her in Portland several years before and in riding on her three years before, and his examination of the wreck (R. pp. 41, 42), he testified that it would cost $75,000 to $76,000 to build such a vessel at Portland (R. p. 38); although Mr. Supple could do it for $55,000.

A resume of the entire testimony produced by the appellee in this case, aside from the alleged value for monopolistic purposes, will show that it has been practically confined to an attempt to establish two points.

First. That the "Telegraph" was a vessel capable of making a speed of twenty miles per hour, which speed for that type and class of vessel was very unusual, and which they contend gave her a special value.

Second. The cost of building a vessel similar in type to the "Telegraph" that could make and maintain a speed of twenty miles per hour.

Mr. Green testified that he asked for tenders, or bids, based on a guarantee of twenty miles per hour (R. pp. 91, 93, 113).

It necessarily follows that, if appellee failed to establish that the "Telegraph" could make and maintain said speed, then all of the testimony which has been presented by appellee as to the cost of constructing a boat similar to the "Telegraph," except that such new boat should make twenty miles per hour, will be valueless in that it constitutes no evidence as to the coast of constructing a boat identical in all particulars to the "Telegraph," and capable of making the "Telegraph's" speed.

A vast amount of testimony was taken by both parties to show the speed of the "Telegraph." This testimony, as is usual in such cases, is conflicting. A careful study of it, however, will show that most of the witnesses testifying for appellee, while very positive in stating what speed they *thought* she could make, did not, as an actual fact, know what she could or could not do. It has all been guess work without any actual tests having been made to confirm their opinion. It is but natural that most of these witnesses are employees of appellee, which may, perhaps, have had some influence in coloring their views.

As against this evidence, appellants have produced the evidence of a number of disinterested witnesses, amongst whom was Gilbert H. Parker,

the former master of the "Telegraph," when she was at her best, and when she had the greatest speed. He stated that, in his opinion, the "Telegraph" could not make twenty statute miles an hour carrying legitimate steam (R. p. 129), and, in his opinion, that, in the race, during which she made her record time, and during which race she disabled herself, she was not making twenty miles per hour (R. p. 135). Furthermore, that she was not nearly as fast a boat at the time of her loss as she was when she was built, shortly after which this race took place.

Barney Dionne, former chief engineer of the "Telegraph," who was on the vessel at the time of the race, testified that in his opinion the "Telegraph" never did and never could make twenty miles an hour in dead water under any circumstances. If she ever made that time, it was only when she had a tide or current to help her to make the difference. He stated that he got out of the "Telegraph" all the speed she ever made, and the best she could make was between eighteen and nineteen statute miles per hour (R. p. 344).

Arthur Riggs, formerly master of the "Telegraph" when she was running on the Columbia River, testified to her speed as follows:

> "The time I ran from Astoria to Portland in five hours and sixteen minutes against the current, but with the benefit of the flood tide from Astoria to a point between Cathalamet and Eureka, and if the distance from Portland to Astoria is 90 miles, the maximum speed under ordinary circumstances was between 18 and 19 miles an hour. I think this was in August, 1905."

We believe that a review of all the testimony adduced, bearing on the question of speed, will convince the court that appellee has failed to establish that the steamer "Telegraph" at the time of the collision was capable of making twenty miles per hour, and that, therefore, the testimony as to the cost of building a similar vessel, capable of making and maintaining that speed, is valueless.

THE TRIAL COURT'S DECISION.

As we have stated, the trial court refused to accept the evidence of market value or evidence of cost of constructing a vessel like the "Telegraph," as furnishing "a fair guide to the determination of the award to be made" (R. pp. 355-356), and based its decision "upon the proposition of original cost, allowing for the difference of her upkeep and the natural fair depreciation of her hull, engines, house and equipment" (R. p. 356). The trial court did

not decide that the rule of market value is not the correct measure to be applied in this case; nor state any reason, as shown by the evidence, why this rule should not apply. It refused to accept appellee's evidence of cost of constructing a vessel like the "Telegraph," but did not decide whether or not evidence of such cost, less depreciation, would be the proper measure of damages in the case; although it stated that it was influenced by such evidence. It did not hold that the cost of original construction, less depreciation is the proper measure of damages in such a case, but based its decision on such evidence, influenced by the other evidence it discarded, as well as by evidence of an offer of compromise, which it stated was "possibly not a proper element to be considered by the court" (R. p. 356).

In short, it appears from the decision that the trial judge had the case under advisement for only three weeks during a rush to dispatch business pending before him in anticipation of his retirement from the bench on the following week and decided the case on a compromise basis, rather than deciding what rule of law was applicable, and what competent evidence had been introduced to base a judgment upon; recognizing that in so doing, neither party would be satisfied.

Nor was the trial court accurate in this treatment of the facts, for it stated that the "Telegraph" cost a minimum of not less than $75,000 (R. p. 357), apparently overlooking the fact that this included the expense of discarding the original engines and installing new engines at a cost of approximately $12,000 (R. p. 54).

The only evidence of the cost of building the "Telegraph" was the testimony of Capt. Scott, and his son. This son, C. D. Scott, testified that she cost $75,000 (R. p. 13); which included the new engines (R. p. 15). At the time the vessel was built at Everett, and until Mr. Green purchased her, this witness was ticket agent for his company at Seattle. He had no personal knowledge of the cost of the boat (R. pp. 14-17), and his general, hearsay testimony could have no weight whatever.

Capt. Scott testified that he built the "Telegraph" at Everett in 1903, she was therefore nine years old when lost. She was built for speed and carrying passengers, and had little freight carrying capacity. After she was built, he made a number of alterations and changes in her. He testified as to her cost as follows:

> "She cost a little over seventy-five thousand dollars, with the machinery I last put in, compound engines" (R. p. 54).

Q. That included the machinery that you bought from the O. R. & N.?

A. She did not cost that much at first.

Q. The total cost that you gave included the machinery which you bought from the O. R. & N.?

A. And the other; yes, sir.
(R. p. 54).

Q. Captain, the "Telegraph" was built at the Sumner Iron Works at Everett, was she?

A. Yes, sir.

Q. And do you know how much the hull cost?

A. I do not. The hull and cabin was all built in one contract, but I really cannot say exactly what it was, but I think it was about $15,000, something like that. I forget. I have not set this down. I used to know. I could have told you before, what all the boats I ever built cost, but I forget. I am in my old age, and I do not try to recollect like I did.
(R. pp. 59-60).

A. I bought them engines, the type first used in her, high compress-engines, and then I put in the new compound, and the boys figured that up, the bookkeeper, and it runs something like ten thousand dollars.

Q. That is for the new engines.

A. Yes, they were all new engines, well-built compound engines and everything fit.

Q. That ten thousand dollars included taking out the old engines and installing the new besides their cost?

A. Yes; my boy says it cost twelve thousand dollars; maybe they did.

Q. Could not have been over twelve thousand dollars?

A. Something like that.
(R. p. 60).

Q. Could you give any estimate of the entire cost of the furnishings, such as chairs, carpets, linoleum, etc.?

A. No, that was all down. I could not give it to you but it was all down; it was all right in there and they showed it to me when the boat was done each time. I forget what the price of that was, but I know the whole cost was footed up and it was that much money.
(R. p. 62).

Q. The cost of the engines then, that you were talking about was the cost of the new engines and old engines both?

A. Yes, sir.

Q. That included the cost of the old engines and the cost of the new engines?

A. I just simply throwed them out; gave them to some iron works for scrap.

Q. And this $12,000 that you speak of, was that the cost of the new engines and the cost of both engines?

A. The cost of the boat in the first place with the old engines, you might call them, they were new then, they cost us as near as I recollect eight thousand dollars, and when we added the other that ran the cost up to over seventy-five thousand dollars. I did not get anything for these engines we put out.
(R. p. 66).

When Capt. Scott testified, he was an old man

whose memory was very faulty (R. pp. 60, 69), and as testified by Mr. Green, whose witness he was, "he was getting in his dotage." He could not remember the cost of the vessel's equipment, which Mr. Walker placed at from $15,000 to $20,000, out of his total estimated cost of $75,000 (R. p. 21). Capt. Scott testified the hull and cabin cost about $15,000; Mr. Walker's estimate was $30,000 (R. p. 21), and the other witnesses were as high or higher. Capt. Scott placed the cost of the new engines installed at from $10,000 to $12,000, but admitted that it cost more to take out the old engines and install new ones, than it would have cost to put in the new engines in the first place (R. pp. 60-61). He did not give the cost of the boilers, which Mr. Mathewson estimated from $9,000 to $12,000 (R. p. 106). In fact, Capt. Scott's testimony as to the cost of the vessel is so general and indefinite, that it would seem to us entirely insufficient alone to base a judgment upon in this case. But even if this testimony be made the basis of the judgment, certainly the total cost of the vessel, including all subsequent alterations and the new engines, making a double set of engines, could not be taken as the original cost. If the engines had been changed a few more times, and the cost of the new engines added each time to the aggregate prior

cost, the figure would have gone over $100,000, which manifestly could not be taken as the basis from which to figure.

The unreliability of the testimony of the venerable Capt. Scott is best evidenced by the statement of Mr. Green, who called him as a witness, that "Capt. Scott was getting to be a very old man; he was getting in his dotage" (R. p. 97). The witness himself admitted that he was an old man whose memory was very faulty (R. pp. 60, 69). That he was unable to remember that he was paid $55,000 by Mr. Green for the two steamers and the route two years before is a strong indication of how unreliable his testimony must be of what it cost to build a steamer nine years before. This is especially so when it is recalled that many alterations in plans were made, the boilers were not accepted by the United States inspectors as originally installed, bands had to be put around them (R. p. 15), the original engines were removed and replaced by entirely new machinery (R. p. 65), besides the other minor changes involved.

If, however, the testimony of Capt. Scott is accepted as reliable, it is manifest that as in the amount which he testified to be the total aggregate cost of the steamer, viz., $75,000, is included the

cost of the engines originally in the steamer, but subsequently removed, cost of and installing the new engines, cost of putting the bands around the boilers and other items of like nature which did not increase the value of the vessel, all such expenses should be deducted from the $75,000 before the proper construction cost can be ascertained.

While Capt. Scott has testified that the expense of changing the machinery amounted to $12,000 he has not testified as to cost of other items. He stated that the hull and houses cost $15,000, and that the cost of the engines installed was $12,000. Others of appellee's witnesses say that the boilers would cost $9,000 to $12,000 (Matthewson, R. p. 106), and the equipment $15,000 (Walker, R. p. 21). The foregoing items comprise all the parts of the steamer, and aggregate $51,000 to $54,000.

We believe, therefore, that a careful review of his testimony will show that the original cost of this vessel, without the expense of the numerous changes made necessary through improper construction, would not exceed $55,000.

As against using evidence of cost of construction as a basis of value, showing has been made that—

The "Telegraph" was an obsolete and out-of-date vessel (Wilson, R. p. 146).

The "Telegraph" is a "departure entirely and a freakish model" (Wilson, R. p. 156).

Such vessels as these are out of class on Pugst Sound (Wilson, R. p. 160).

She was a class of boat which the appellee was getting rid of and was building as rapidly as possible to take their places an entirely different class of vessels (Skinner, R. p. 185).

Appellee is building a different class of boats now; iron and steel boats, rather propellers. That class of boats seems to be taking the place of the old stern-wheelers (Capt. Gilbert H. Parker, R. p. 133).

The appellee are constructing new iron propeller steamers to put on these routes all the time, a class of steamers of a different type to the "Telegraph" (Gibbs, R. p. 204).

She was a boat that when originally built the inspectors refused to pass the boilers as built because the crown sheet was too high, or did not come down far enough, and the set bolts in the boilers were too far apart, so that the inspectors would not pass it until four or five strips had been put around the boiler (appellee's witness Scott, R. p. 15).

She was a boat in which the original machinery was subsequently removed and a new set of engines put in its place (appellee's witness Scott, R. p. 65).

She was a boat in which the owners first cut off about eight inches of the bevel transom at her stern as it interfered with her backing, and subsequently cut off eighteen inches more, and further cut off eighteen inches of her bow (Barney Dionne, R. pp. 345-346).

She was a boat difficult to steer. Very few men can steer her on the Sound. She is apt to travel three miles out of every twenty winding around the Sound, trying to steer her (appellee's witness Smith, under cross-examination, R. p. 254).

She is not a practical vessel (Supple, R. p. 349).

This uncontradicted testimony shows how futile it is to attempt to place a value on this steamer based upon the cost of construction, less physical depreciation alone. To do so would be to absolutely ignore the depreciation in value which necessarily follows a vessel becoming obsolete in type, and further ignores the peculiar infirmities of the vessel, naturally detracting from her value as a commercially practical vessel.

Realizing the impossibility of establishing the

fanciful and excessive value which they are claiming by testimony as to what the actual value of the steamer was immediately before she was sunk, appellees have resorted to the only course left open to them of trying to prove a theoretical value by using as a basis what it would cost to construct a similar boat, and deducting therefrom a theoretical physical depreciation to arrive at the value immediately prior to this collision.

Witnesses for the appellee have testified that the depreciation on the "Telegraph" was as follows (Walker, R. p. —):

Hull	25 per cent.
Machinery and boilers	10 per cent.
Equipment	25 per cent.

If Mr. Walker is correct that the "Telegraph" in nine years had only depreciated to that extent, then the hull was good for 36 years, and the engines and boilers for 90 years. Mr. Green placed the depreciation at from 15 to 20 per cent., giving her a life of from 45 to 50 years. To say the least, it is an absurdity on its face, and requires no further evidence in refutation than the already uncontradicted showing that in nine years she had become old and passed out of date. Much more acceptable, there-

fore, must be the testimony of Capt. Wilson of at least 50 per cent. physical depreciation. The trial court based its decision on a depreciation of 40 per cent.

It appeared that Capt. Gibbs, one of appellant's witnesses, had surveyed the wreck as the representative of the underwriters, and on cross-examination he was asked, over appellant's objection (R. p. 201), if he had not recommended giving appellee the wreck and paying it $36,250 in settlement of its claim for loss of the vessel. We were very much surprised that proctor for appellee should ask such a question, or insist on an answer over our objection; as it certainly requires no citation of authority to this court to show that evidence of negotiations for settlement before suit are wholly incompetent and improper. Even proctor's statement that the question was "asked for the purpose of throwing light upon this witness' opinion of the value of the vessel" (R. p. 201), did not make the question proper. This was in no sense a statement by the witness contrary to his testimony, which would be admissible; but it called solely for evidence of what he recommended as a settlement of the controversy.

However, we think the witness' explanation of his recommendation, which was not disputed by

Mr. Green, shows the injustice of the award made in this case by the trial court. The witness stated that he made the recommendation because he thought there would be a liability for demurrage, and he wished to avoid the expense of litigation (R. pp. 201-203). He further stated that his recommendation was that *an offer made by appellee* to settle for that sum be accepted (R. p. 203). Appellee did not dispute that it made such offer, nor that it was then supposed there would be a claim for demurrage which was included in the offer; although, of course, no claim for demurrage has been or could be made in this case, where the loss is alleged and admitted to be total.

The trial court showed in its memorandum decision that it had not carefully considered the evidence. It not only made the mistake of saying that the offer of compromise was made by Capt. Gibbs, as against the evidence and the fact that the offer came from appellee to Capt. Gibbs, and was declined by him after consulting with his principals. The court speaks of the offer as $37,500, whereas the uncontradicted evidence showed it to be only $36,-250 (R. pp. 201-356).

While this evidence is improper, still, as it was brought out by appellee, and erroneously referred

to by the trial court, it is necessary for the facts to be correctly stated.

It would indeed be regrettable should this offer of settlement, made by appellee and declined by appellant, admittedly improperly introduced by appellee over our objection be considered by the court, and, on a mistaken idea of the facts, be interpreted to the advantage of appellee and to the detriment of appellant.

These errors as to the undisputed facts as shown by the record very clearly indicate the hasty and inadequate consideration which the trial court was able to give to this case in arriving at its conclusions.

The trial court refused to consider the amount paid by appellee for the "Telegraph" and "City of Everett" and the Seattle-Everett route a little over a year before the collision; also the insured value of the two vessels.

We do not contend that the price paid by appellee for the "Telegraph," taken alone, should be the measure of recovery in this case; but we do contend that such evidence was proper on the question of the market value of the vessel. Capt. Scott testified that he sold both vessels and the route to Mr. Green

for $55,000 in the fall of 1910 (R. pp. 57-58). He testified that the boats were making money, from $30,000 to $42,000 a year, but that they wanted to quit and took appellee's offer, which was the best they could get (R. pp. 67-68). Mr. Green claimed the route was valueless, although admitting appellee had maintained it ever since, and he considered the route would become valuable. Certainly, if the route was worth holding, and these two vessels could earn from $30,000 to $42,000 a year on it, the route was worth something when it was purchased. Mr. Green claimed the "City of Everett" was "practically worthless" (R. p. 98), but she had been operated on the route ever since her purchase (R. p. 97), although the "Telegraph," which was a stern-wheeler, while the "City of Everett' was a propeller vessel, was laid up during the winter months (R. p. 97); and appellee had the "City of Everett" insured on a value of $27,270, while it insured the "Telegraph" on a value of $27,500 (R. pp. 95, 143). Capt. Scott testified that the "City of Everett' was a sound, good boat, when sold, and cost $42,000 to build.

Mr. Green testified in respect to the purchase from Capt. Scott:

"A. And we made him believe it (on the inter-urban being built) would make him lose a lot of money in order to make him sell the boats cheap (R. p. 97)."

* * * *

"Q. You fooled yourself as well as the Captain?

A. Well not as badly as we did the Captain, I don't think (R. p. 97).

* * * *

"A. Captain Scott was getting to be a very old man; he was getting in his dotage" (R. p. 97).

In the face of this evidence, the thought naturally occurs that, if in their efforts to buy these boats and this route cheaply the appellee would fool old Capt. Scott, who was getting in his dotage, is it not possible that in their attempt to prove the damages sustained by the loss of the "Telegraph" they may likewise be trying to fool others as to her value?

All this evidence, we think, was competent as showing that the "Telegraph" was actually sold in the Seattle market for a price not exceeding $25,000, the outside market value given by appellant's witnesses; and also shows that an award of $45,000 as the value of the "Telegraph" alone, about a year later, was inequitable.

A large amount of testimony was taken by both sides to show the speed of the "Telegraph," as

her speed was the only ground upon which appellee claimed a right to recover a special value for her, and not her market value. It is apparent from the trial court's decision that it did not believe that the "Telegraph" was especially valuable on account of her speed; or that appellee could claim a special value on that account. We have no doubt that this court will reach the same conclusion after reading the evidence. To be the fastest stern-wheel vessel on Puget Sound, or even the Pacific Coast or the world, certainly does not place a vessel, used only for commercial purposes, in a class by herself, such as a racing yacht. Much less so when other similar but faster vessels could be purchased in the market and brought to the Sound to take her place; and especially as the only work she was capable of doing, i. e. carrying passengers, is being done now by a different class of vessels. As well might it be claimed that because an old sailing vessel had been or was the fastest of her kind, her value in case of her loss, would be her cost, or the cost of building like her, less physical depreciation, instead of her market value, because the demand for such a vessel would not be great. This certainly cannot be the rule, for in every case it would enable the owner to obtain a fancy price for a vessel he could buy for much less;

that had no special earning power for him, and that could not be sold for any such figure. We do not think the court will sanction such injustice.

SUMMARY.

The following disinterested witnesses have testified to the actual value of the "Telegraph" immediately prior to her loss, as follows:

Capt. Chas. E. Wilson (R. p. 146)	$16,000
C. W. Cook (R. p. 315)	20,000
Marcus Talbot (R. p. 339)	25,000
Capt. S. B. Gibbs (R. p. 194)	25,000

No testimony whatever has been adduced by appellee to disprove these values.

It is admitted by appellee that the purchase price of the two steamers and the route was $55,000. The insured value of the "Telegraph" was $27,500, and the "City of Everett" $27,270. Is this not at least informative evidence of the correctness of the values testified to above?

If the "worthless" "City of Everett" (R. p. 98) had an insurable value of $27,270, granting that the route purchased with her was "worth nothing" (R. p. 98), how is it possible to reconcile the

insured valuation of $27,500 on the "Telegraph" with that on the "City of Everett?"

The pride with which Mr. Green speaks of "breaking his competitors" and his own business sagacity in so monopolizing the business of Puget Sound that, according to his own testimony, no route on which the "Telegraph" might be used was left to anyone, is hardly indicative of the fact that he would insure the two steamers on practically the same valuation if he did not consider them of the same value. It is a fixed fact in the case that the two steamers and the route were purchased for $55,000. The route, despite Mr. Green's endeavor to belittle its worth, was valuable enough for him to ever after maintain his steamers upon. His own witness, Capt. Scott, testified that the "City of Everett" was in good condition when he sold her (R. p. 59), whereas, he says she was worthless and out of date (R. p. 98). In view of such testimony, how can it be consistently asserted that the insured valuations other than expressed the owner's ideas of the approximate actual values? It is safe to conclude that if there was a disparity in actual value, there would be a like disparity in the insurable valuations. The fact that the latter was for all practical purposes the same, is the best evidence as to

equality of the former. No stronger evidence is needed of the futility of attempting to conjure up the fictitious value now contended for by appellant.

The steamer "Telegraph" was not built by appellee for the special purposes of its business. She was purchased by it after she was an old vessel as a part of a transaction in which appellee acquired an established business and eliminated a competitor.

Under these conditions it is difficult to conceive of any grounds, either in equity or common sense, by which the theoretical basis, viz., cost of construction, less physical depreciation, could be used in determining the value of this steamer as against the positive and undisputed testimony of disinterested witnesses as to the actual value, the approximate correctness of which value is confirmed by the insured value placed upon the steamer by the appellee.

It is not contended by this appellant that this steamer or any other steamer has a market value in the sense that there is a market value for corn or wheat or other commodities bought and sold. That sales of vessel property are not as frequent as other classes of property, however, has not prevented the courts from recognizing that such sales as are made create and establish a market value. That the value

of the "Telegraph" as proved by the appellant in this case is such market value as comes within the rule of damages pronounced by the courts is confidently submitted.

It is true in this case that the "Telegraph" was sunk by the wrongful act of appellant. This act was wrong in law, but there is no claim that the act was intentional or malicious, nor are any circumstances shown or claimed which call for imposing upon appellant the burden of paying anything more than the fair value of the vessel, considered merely as property, and in view of what other vessels have been sold for. We feel that the testimony of Mr. Talbot and Captain Gibbs that they considered the value of the "Telegraph," when she sunk, as $25,000 is very favorable to appellee. This figure would allow it nearly one-half what it paid for the two vessels and the route over two years before. It would allow it nearly all it valued the vessel for insurance purposes; it would enable it, if it so desired, to purchase the vessel from the present owners, repaired and as good as new, and still have $6,000 in cash besides the vessel; and it would give the appellee as much as larger, better, faster and more practical vessels have been voluntarily sold and purchased for. If appellee secures

that amount, it is certainly all that in equity and good conscience it is entitled to, and we believe all that the evidence in this case would justify; while we feel that to allow appellee more, would be to punish appellant for a misfortune for which it is liable, but for which it should only be liable for such damages as the law and the testimony of fair, impartial and competent witnesses shows the value of the vessel was.

We respectfully submit that the trial court erred in finding the value of the "Telegraph" to be the sum of $45,000, or any sum in excess of $25,000; and that the decree should be reversed, and judgment ordered in favor of appellee for not to exceed $25,000, with its interest and its costs in lower court, but with costs to appellant on this appeal.

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IN THE

UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALASKA STEAMSHIP COMPANY, a Corporation, Claimant of the Steamship "ALAMEDA," Her Engines, Boilers, Tackle, Apparel and Furniture, *Appellant,* *vs.* THE INLAND NAVIGATION COMPANY, a Corporation, *Appellee.*	No. 2276

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLEE

INTRODUCTORY STATEMENT

In this cause, the sole question before the lower court was: What amount of money will compensate the Inland Navigation Company for the loss of the

"Telegraph?" The District Court has said: Forty-Five Thousand Dollars and interest. The sole question before this court is: Is that amount excessive?

Shortly after the appellee was deprived of the "Telegraph" by the tortious act of the appellant it became apparent that the amount of compensation to which the appellee would be entitled for the loss of its vessel would have to be arrived at by judicial inquiry. It thereupon became the duty of the appellee's proctors to investigate the conditions and to consider what data would best serve the court in determining the amount that would justly compensate the appellee for the said loss.

Keeping in mind that the question to be determined was: What amount will justly compensate the libelant for its loss—what amount will make it whole—we speedily saw that no evidence of market value could be secured that would be of any real assistance in its determination, and for these reasons: first, because there was no demand for fast stern wheel passenger vessels of the class of the "Telegraph," and no frequency of purchase and exchange by which market value could be fixed or known. Second, because the "Telegraph" by reason of her speed and other characteristics was in a class by her self, and for various other reasons was of peculiar value to her owners.

Under these circumstances we felt that a witness in giving market value could only give the wildest

sort of guess or that his estimate would be as to what a speculator might bid in the market; or perhaps a purchaser who wanted to convert the vessel into a tow boat. Such values could be no criterion of The Inland Navigation Company's loss or fix its compensation, for it was deprived of a large fast passenger vessel operating on a regular run..

We felt also that like situations must have arisen and have been determined by the courts and that the authorities would show that in such circumstances market value cannot justly measure the damage, but that other circumstances such as the cost of building the vessel, its condition at the time of loss and the sum for which the vessel could be reproduced, less deterioration, must control, and this information we determined to furnish the Court.

It is not too much to say that the correctness of these preliminary observations have now been fully established and we shall show by extracts from the records and by citation of authorities. The appellant attempted to show a market and failed. Its witnesses estimated our loss by what they thought the "Telegraph" would sell for to someone who wanted a towboat, or who wanted to buy her for junk or what not. Yet, the appellant, notwithstanding this and notwithstanding the fact that the principles of law indicated above have been found to be sustained by the authorities, sought in the lower court and seeks here to fix our compensation

from that kind of evidence, though we have furnished the court with full, undisputed, and disinterested evidence from the most reliable sources, of the cost value, and reproduction value, less deterioration, of the lost vessel.

Our argument will proceed along the following lines.

1. The appellant not only failed to show such a market for vessels of the "Telegraph's" class as would tend to make her market value fixed and known, but actually proved that no such market existed; and its so called market value evidence throws no light on the question—What amount of money will justly compensate the Inland Navigation Company for the loss of the "Telegraph."

2. The law has always recognized the rule that where for any reason a vessel's market value cannot be established, that her value may be properly proven by other circumstances, such as cost of building and cost of reproduction less deterioration.

3. In this case the evidence of original cost and of what it would cost to reproduce her, less deterioration is so exact and clear and from such responsible sources that in the absence of any reliable evidence of market value, it furnishes the only true criterion from which to estimate the value of the "Telegraph" and fully sustains the Decree of the Court below.

ARGUMENT

THE APPELLANT'S EVIDENCE AFFIRMATIVELY SHOWS THAT THERE WAS NO MARKET VALUE FOR THE "TELEGRAPH," AND FURNISHES NO CRITERIA FROM WHICH APPELLEE'S LOSS COULD BE DETERMINED.

This contention involves an examination of the appellant's attempts to prove a market value for the "Telegraph." Its first witness was Captain Gilmore H. Parker, a Master Mariner, who has been on the Sound since 1867. (R. p. 131.)

With regard to the value of the "Telegraph" he testified as follows:

Q. What in your opinion would be the reasonable value at Seattle in April, 1910?

A. I could not give any idea at all. (R. p. 133.)

On direct examination he testified at length as to where and for what purposes the "Telegraph" might be used, and in cross-examination testified as follows:

Q. Would there be any bidders or purchasers for such a boat other than those who wanted to use her for passenger business?

Mr. Merritt. I object as not proper cross-examination.

A. Well, not unless you make a towboat out of her, she would make a good, powerful boat (R. pp. 137-138.)

He further testified as follows:

You are familiar with the passenger traffic on the sound in general?

A. Yes sir.

Q. You do not know of any route upon which the "Telegraph" could be used that is not occupied by some line?

A. I do not know of any.

Q. Would there or would there not be any market value for the "Telegraph" unless that value was established by some one that had a route to use her on.

Mr. Merritt. I object as incompetent, irrelevant and immaterial. The witness is not qualified to answer, and it is not proper cross-examination.

A. She would be of no market value on Puget Sound as a passenger boat only the way she is now operated as an extra boat by the company which owns her. (R. p. 142.)

As the "Telegraph" had not been operated since she was sunk it is only fair to assume that in answer to the last question Captain Parker meant as she was operated just previously to that event, by the then owner, the appellee here.

TESTIMONY OF APPELLANT'S WITNESS CHAS. E. WILSON

The appellant's next witness on the question of market value was Captain Charles E. Wilson, whom

the appellant characterizes in the summary to its brief: as a "disinterested" witness. He confesses that he is known on the water front as "Cyclone" Wilson and openly avows his enmity to the President of the Appellee Company. (R. pp. 170-172.) This alone would vitiate his evidence, but a full reading thereof will show that it is altogether unworthy of any serious consideration, it being mostly hearsay and sailors' talk. However, as he was the star expert in market values, we quote illustrative excerpts from his testimony along that line. It is best introduced by the following statement from his cross-examination.

"I never sold a stern-wheel boat in my life." (R. p. 169)

How unfamiliar he was with the "Telegraph" is shown by the following from his examination in chief.

Q. Did you know the Steamer "Telegraph" before she was sunk?

A. Yes sir.

Q. Were you somewhat familiar with her and knew how she was constructed?

A. Oh, I knew more or less of that vessel from the time they started to build her; took considerable interest in her. Of course, it was the subject of conversation among marine men. I knew the engineer very well that worked on her and we stopped at the same house part of the time. (R. p. 145.)

Shortly after Captain Wilson had shown his utter want of real knowledge of the vessel he gave the following unique testimony in regard to the Seattle market and market values—testimony which appellant seriously contends measures the loss to The Inland Navigation Company of a large, fast, finely preserved and recently overhauled passenger steamer operating on one of the Company's regular runs.

Q. I will ask you whether or not in April, 1912, if there was a market at Seattle for vessels—stern wheel vessels?

A. Why there is always some market for anything, even a jack-knife out of your pocket if you sell it cheap enough. But vessels of that class I would say are obsolete and out of date, but she surely would have brought something. (R. p. 146.)

The appellant's proctor it would seem from his next question had about the same idea of market value as his witness Wilson; and this idea that appellee's loss is measured by the vessel's junk value or "speculative" value, or the price she would bring, if she would bring any price at all, he maintains throughout the whole case.

Q. If she had been offered for sale at Seattle, in April, 1912, before she sunk, in your opinion then, there would have been offers to buy her at some price?

A. Yes, I think some one would have bought her.

Q. You know as a matter of fact that she has been sold since she was sunk, the wreck has been sold?

A. Any vessel is worth something, if for nothing more than junk. (R. p. 146.)

Subsequently Captain Wilson in response to an inquiry about the fair reasonable market value of the "Telegraph" ventured an opinion that she was worth $16,000.00, though he was doubtful about that and said that "the market is not a live one for that class of vessels." (R. p. 146.) Then follows lengthy hearsay testimony about sales of other boats of various classes and at remote times. And again appellant's proctor and his witness get back to the "junk" idea, the proctor inquiring whether if the "Telegraph had been offered for sale before she was sunk there would have been persons willing to buy her at some price who were not compelled to buy her," and the witness answers:

A. Yes there is no doubt of that, I seldom ever saw any vessel set on this market that could not be sold for a price to a junk man. They always buy them for something. (R. p. 154.)

We may say parenthetically that we have no doubt that in this respect the witness's testimony is true. We have never disputed that there is a market for junk in Seattle. Further light on Captain Wilson's ideas of markets and values is shown by the following extracts from his cross-examination:

Q. In other words Captain you do not think you could get in the market for a vessel of that class what she was worth?

A. No sir, I do not. (R. p. 159.)

And later along the same line he testified as follows:

Q. Do you not mean that the market, if there is such a thing as can be called a market, does not reflect the real value of the boat?

A. I would be pleased to answer any question I can in a fair way. Now, I would think that it is hard to answer that question. Such vessels are out of class on Puget Sound. On some rivers they use them. On the shallow rivers they are the best, but are usually lighter draft. Now, then there is a lot of real value in them, like an old automobile; they give good service, yet you can buy them for almost nothing; they are out of date, and there are not many people who desire that kind of an old vehicle or steamboat. (R. p. 160.)

The witness was asked if the market for passenger vessels was necessarily restricted. Along this line he testified as follows:

A. I would not consider for first class vessels in propellors, modern, up-to-date vessels, there is a market most of the time.

Q. I suppose you are familiar with the passenger traffic on the Sound here?

A. I ought to be in a general way, yes. In detail I do not know.

Q. Do you know any route upon which the Telegraph could be placed that is not already occupied by an established route?

A. I do not. That is you mean placed successfully in a business way?

Q. Yes?

A. No.

Q. That question would have an effect upon the market of course?

A. Why the economy of the ship has first to be considered, any one trying to make money anyway. (R. p. 164.)

But as a matter of fact did Captain Wilson attempt to give a market value, or is his system at arriving at values somewhat like the theory adopted by the appellee. Light is thrown upon this question by the testimony following.

Q. You testified that you made this estimate of $16,000 taking into view her cost, the use to which she could be put and her depreciation.

A. Yes sir.

Q. When you made that estimate you made it on the belief that she cost $46,000.00.

A. Yes sir. (R. p. 162.)

Subsequently he testified as follows:

A. I testified previous to this that the value should be based upon what the boat actually cost,

and their size; if they are similar boats one a third bigger would naturally cost about a third more.

Q. That is your primary element of value, what it cost to construct, of course taking other things into consideration?

A. Taking her original construction, the amount of money spent and if she is built upon the improved lines of construction and does not depart from that there must certainly be a definite value, and the more material you put in of the same quality and the more labor and stuff the more she will cost. (R. p. 168.)

Thus it will be seen that Captain Wilson did not attempt to give real market value, but arrived at his figures by an altogether different process, and one by the way which was based upon erroneous premises, since he "understood" that the original cost of the Telegraph was $46,000. This by the way is characteristic of Captain Wilson's evidence as can be seen by reading it, for it is almost altogether made up of things he heard, or things he understood, or things someone else told him. It certainly does not tend to prove a market value for the Telegraph. It disproves it. And as for throwing any light upon the question of the amount of appellee's loss is of no value whatsoever, unless indeed, as the appellant seems to contend we are compelled to accept junk value for the loss of a well appointed passenger vessel.

TESTIMONY OF APPELLANT'S WITNESS, GEORGE N. SKINNER

Mr. George N. Skinner who at one time had operated a boat in opposition to the "Telegraph" on the Bremerton run (R. p. 182) was the appellant's next witness. Appellant in its brief says; that Mr. Skinner testified that the Telegraph could have been taken to and used upon any of the inland waters of the coast and that in his opinion there was a market for her. (Brief p. 31) Mr. Skinner qualified himself for this kind of evidence in the following manner.

Q. Are you familiar with the different usage to which vessels of her kind can be put in Puget Sound and other waters?

A. I have absolutely no knowledge of the operation of stern-wheel boats. I have never been connected with the operation of a stern-wheel boat. (R. p. 178.)

As to the statement in the brief that Mr. Skinner testified that there was a market, it may be said that the Appellant's proctor labored faithfully to secure that result, but that the wituess was evasive and nonresponsive. His attempts to get away from so testifying and his final success in so doing by fetching up at the "some value" idea of Captain Wilson is shown below.

Q. I will ask you whether or not from your knowledge of shipping on Puget Sound and other

waters where the "Teelgraph" might be used, there would be any market for a vessel of her kind at the time?

A. The "Telegraph" has been in service all the time that she has been on the Sound. She might have been laid up temporarily for short periods of time, but I think she has been in operation pretty nearly constantly since she came up here.

Q. She is a boat that could be operated on almost any of the lines on Puget Sound?

A. I think so.

Q. And, in your opinion would there be any market for a vessel of that kind at the time she was sunk?

Q. I do not know why, if Mr. Green could utilize her, if some one else had a place to put her, they could not operate her to the same advantage that he could operate her.

Q. Was there anything to stop any one putting another vessel on any of the lines on Puget Sound?

A. I imagine there would not be a market for her on the marked competition for that class of vessel at that time that there would be for a propeller boat, because they are a little out of date. They might, however, be better for some certain purposes than the propeller boat.

Q. Then, would there be any market, in your opinion—what would be your opinion about it, whether there would be any market for vessels of her class?

A. There is always a market for any type of vessel. Somebody has an idea that they can do better with a boat than the other fellow. It depends upon the price. I think the "Telegraph" would have some value on the Sound at any time." (R. pp. 180, 181)

It is submitted that this witnesses testimony clearly shows that there was no market in the fair legal acceptance of the term for the steamer "Telegraph." He says: "It depends on the price." In other words his testimony merely goes to prove that the "Telegraph" would have sold for something. There is absolutely no indication that that "something" would at all compensate this appellee for its loss.

TESTIMONY OF APPELLANT'S WITNESS S. P. GIBBS

In the summary to appellant's brief on page 76 Mr. Gibbs is labeled as a "disinterested" witness. He was in fact the direct representative of the parties upon which payment of this loss will ultimately fall. (R. pp. 197, 201) He testified the "Telegraph" was build principally for speed and for passenger trade; and that he had never timed her speed. He testified that her fair reasonable market value was $25,000. Captain Gibbs was asked a question framed almost exactly in the language used in a discussion of market value of vessels in the "H. F. Dimock" 77 Fed. 226, a case

which will be referred to in our subsequent argument. The question and the answer together with other testimony follows.

Q. Taking that into consideration, and the whole general condition surrounding the passenger traffic here, would say that the "Telegraph" fell within that class of articles which are sold from day to day, so that frequent, current market transactions would enable the owner, if he desired to sell, to obtain a fair value of her?

A. I do not think these transactions are taking place from day to day. It might be a case of holding a vessel for sometime before he could sell her.

Q. I say, taking a reasonable time. I will put the question in a shorter form. Is there such a market here, Captain, that if the Inland Navigation Company had placed this vessel on the market that it could within a reasonable time secure a fair value for her?

A. That would depend on what they call a fair value of the vessel. Vessels have sold of her class, frequently. The "Telephone" was sold over in Portland for $24,800.00 and the "Charles R. Spencer," similar to the "Telegraph," licensed to carry 600 passengers, was sold for $20,000.00, and it would appear to me that there must be a market for this kind of boats. You may have to hold them sometime before you find a purchaser.

Q. Well, in a sense, Captain, there is a market for everything. A. Yes, sir.

Q. As one of the witnesses has already testified in this case. that somebody would buy a vessel for junk at least. What I want to get at, is there

such a market and open enough, that is, are there sufficient bidders so that the price which would be realized in that market would fairly represent the value of that vessel?

MR. MERRITT. I object as calling for a conclusion of the witness as to the value. Our position is that the value of the vessel was the market value, if she had a market value, and it makes no difference whether that market value was what she would cost to build anew, or any other price.

Q. Captain, there are some articles for which there is a limited demand, and which may have certain special characteristics, which could not be sold in the market for their real value, are there not?

A. Yes, I presume there are.

Q. Did the "Telegraph" have a special value on account of her speed?

A. She had more value on account of her speed that a slow boat would have.

Q. Did she not, in your opinion, have a special value to the Inland Navigation Company, because of the fact that they owned so many routes upon the Sound?

A. I do not think I am in a position to pass on a question of that kind, as to what the value was to the Inland Navigation Company. I do not know what the value was to the Inland Navigation Company. (R. pp. 199-200.)

It will be noted that the Captain's evidence bears out our contention that there was no market for the "Telegraph" in Seattle which would reflect her real value or throw any real light upon the extent of our loss.

In the testimony given above Captain Gibbs testified as to sales of other vessels, but it is apparent that he procured his information by the correspondence method as shown by the following:

Q. Captain where did you acquire your knowledge about the sales which you have testified to; that is of the Spencer and the Telephone?

A. I wrote over to our surveyor at Portland and asked him to let me know of any transfers that had been made of stern-wheel steamers within the last year or two; and that I would like to know what they sold for; I have a copy of his letter in my pocket. (R. p. 201.)

Captain Gibbs is so far from being a "disinterested" witness that he is in fact the very man who surveyed the boat for the underwriters and recommended to them that they should pay the Inland Navigation $36,250.00 and give them the wreck. (R. p. 201.)

TESTIMONY OF APPELLANT'S WITNESS, C. W. COOK.

The evidence of C. W. Cook was taken by deposition on interrogatories, and upon such cross-

interrogatories as we might guess would be appropriate to his answers. As appellant says in summary to its brief, he gave the reasonable market value of the Telegraph as $20,000.00. His testimony, however, is qualified by the fact that he never made a minute examination of the Telegraph, but had seen her and known her in a general way; that at the time she was sunk he had not lived in Seattle for five years; and that when he left Seattle in 1906, that there was little demand for boats of the "Telegraph's" class. He further says that her chief value was as a spare boat; and that purchasers would be confined to persons who wanted her for passenger traffic; that he did not know of any possible passenger route on Puget Sound, where the Telegraph could be used which is not already served by an established passenger line; nor did he know of any established line operating on Puget Sound who would have desired to purchase the Telegraph on or about April 26, 1912. To cross-interrogatory Number Four inquiring if the market was active enough in Seattle to induce competitive bidding, he made no answer at all. And to cross-interrogatory Number Five asking him to give instances of sales in Seattle, naming the date, the vessel, her size and type, he made no answer. He testified that there was no demand at San Francisco, nor any on the Columbia River or the Willamette River for the "Telegraph." His testimony shows that the instances of sales given by

him were not within his direct knowledge; and that the particulars were acquired from others. (R. pp. 312 to 319.) We submit the testimony of this witness does not show a market value in Seattle, but tends to show that there was no market by which it could be fixed or known.

TESTIMOY OF APPELLANT'S WITNESS MARCUS TALBOT.

This evidence was also taken by deposition. He testifies that the "Telegraph's" value did not exceed $25,000.00 and that his reason for so saying was that she was built to carry passengers at a fast speed and that at the time she was sunk she was unable to carry passengers at a fast speed. (R. p. 340.) The record is filled from cover to cover with evidence to the contrary. Everybody admits that the "Telegraph" was kept in first class shape and at the time she was sunk, that she was the fastest stern-wheeler on Puget Sound, and one of the speediest if not the very speediest steamboat of any kind on Puget Sound. Mr. Talbot was evidently testifying without competent knowledge. It will be noted also that he admits that there was no active market for the Telegraph in Seattle. He also says that her only purchasers would be those desiring her for assenger service; and that all the routes on the Sound have service; and that he did not know of any of these established lines on Puget Sound who would have wished to purchase her on or about April 26, 1912.

TESTIMONY OF APPELLANT'S WITNESS, JOSEPH SUPPLE.

This evidence was also taken by deposition. Mr. Supple is a ship builder in Portland, and has been in that business there for twenty-five years. He says that at the time and place that the "Telegraph" sunk there was a market for stern-wheel vessels of normal type, but that the Telegraph was of a peculiar type of boat built only for passengers and not for carrying freight or towing; and that the demand for her would be for a strictly passenger run; and that if she had been offered for sale before she was sunk she could have been sold at "some price." He further testified as follows:

Interrogatory No. 6:

"If you say there was such a market at said time and place, state what, in your opinion, was the fair, reasonable market value of said vessel at said time and place. In answering this Interrogatory, you will consider such value as the price which, in your opinion, said vessel would bring in said market if offered for sale by one who desired but was not obliged to sell, and was bought by one who was under no necessity of having it. You will also take into consideration all the capabilities of the vessel and all the uses to which it could be put, either at Seattle or elsewhere where said vessel could be taken and used. (R. pp. 328 and 329.)

Answering direct Interrogatory No. 6, the witness says: "Because of her peculiar type it is difficult for me to say what her market value would be." (R. p. 349.)

Be it remembered that all the foregoing is the appellant's own evidence. Its witnesses uniformly testify that the "Telegraph's" proper use was for the passenger traffic and admit that there was no demand for her on Puget Sound. Appellant's proctor argues at length that she might have been taken to other inland waters; but where? His witness Mr. Talbot of Portland, testified that there was no demand for her at San Francisco, or on the Columbia, or on the Willamette. (R. p. 318.) His witness, Mr. Skinner, says she would not even be available on some Alaska streams, or the Skagit River, or portions of the Columbia, or Willamette and is doubtful about San Francisco bay (R. p. 179). He thought, however, that she might be used as a towboat and that some one would buy her at "some" price.

In fact there is no one of appellant's witnesses who testifies that there was anyone who was willing to buy a large, well appointed passenger vessel such as the "Telegraph" admittedly was. Indeed their testimony is uniformly to the contrary. They do testify that some one would buy her at some price, a towboat man or a junk man or what not. Does that show a market for a passenger vessel? Obviously no, it shows a market for tow-boats and junk.

It seems to be appellant's position as shown throughout the examination of its witnesses that

if the vessel was put up for sale and would bring some price,—that that price would be the market price and measure our loss. And it did prove—as any one would have admitted—that she would have brought some price; but it did not show, or offer any competent evidence tending to show, what she would have brought on the market as a passenger vessel and surely, if market value measures the extent of our loss—and therefore the compensation, we are to receive—we are entitled to the market value of a passenger vessel for that is what we lost through the tortious act of the appellant. It did not prove such market price. How could it when it proved that there was no market? Nor is there a scrap of strictly competent evidence as to other sales of vessels of the "Telegraph's" class though there is some evidence of sales of vessels of different classes at different times and places—most of it purely hearsay and such as could not be tested by cross-examination. As the lower Court points out in its opinion the testimony of these witnesses was not based upon their experience in the actual sales of vessels of the class in question at or about the time in question, or upon an intimate knowledge of the "Telegraph."

"The market value of property is established when other property of the same kind has been the subject of purchase and sale to so great an extent and in so many instances that the value becomes fixed."

Sloan v. Baird, 162 N. Y. 330.

"A price established by public sales in the way of ordinary business."

Am. & Eng. Encyclopedia of Law, 2d, Ed. p. 1153.

"The expressions actual value, market value, or market price, when applied to any article mean the same thing. They mean the price or value of articles established as shown by sales public or private in the way of ordinary business."

Sanford v. Peck, 63 Conn. 493.

The appellant argues that we did not controvert its so called evidence of market value. Of necessity we could not for we could procure no evidence of market value. We showed that there was no market by the testimony of one of the foremost builders and operators on the Sound, a man who has built and operated vessels for thirty-six years. (R. pp. 72-74.) And we showed the same fact by the President of the appellant company (R. p. 84). Doubtless we could have produced witnesses who would have made higher guesses as to what the "Telegraph" might have brought at a sale, than the appellant's witnesses did, for in mere matters of speculation men may be found of all shades of opinion, and it is scarcely to be assumed that the appellant, in choosing its witnesses happened to hit upon just these men who would give the very highest values for the Telegraph. Doubtless we could have found some one, some where, who would have made a higher guess. But this class of testimony would have been of no assistance to the Court.

WHERE A VESSELS MARKET VALUE CANNOT BE SHOWN IN PROVING DAMAGES, HER VALUE MAY BE PROVEN BY OTHER CIRCUMSTANCES SUCH AS HER BUILDING COST AND REPRODUCTION COST, LESS PROPER ALLOWANCE FOR DETERIORATION.

In the interest of brevity we will quote from some of the authorities with very little comment.

"There cannot be an established market value for barges, boats and other articles of that description, as in cases of grain, cotton, or stock. The value of such a boat depends upon the accidents of its form, age, and materials; and as these differ in each individual there could be no established market value. A person may make considerable profits by the use of an old hulk of little value in the market for vessels."

The Granite State, 70 U. S. 210; 18 L. Ed., 180.

"But in the case of a ship adapted only for special purposes, and of such exceptional character as to be in fact unmarketable, some other criterion must be adopted. In these cases the Court will endeavor to arrive at the real extent of the loss sustained by calling to its aid every circumstance which may assist it to form a correct estimate, and the original price of the ship, its condition at the time of the loss, and the sum for which the plaintiff could have got such another ship built may be very important matters in the calculation."

Williams & Bruce's Admiralty Practice (2d Ed.) p. 97.

"While it is undoubtedly true that the best single class of evidence of market value is the opinion of competent persons who knew the vessel

and knew the state of the market at the time of the loss, it does not follow in any given case, because witnesses testify to certain facts, that either the commissioner or the court is shut up to their evidence without giving any heed to other kinds of evidence which may be offered. The cases cited by the appellant recognize equally the competence of evidence of the cost and deterioration as bearing on the amount to be allowed. Where from stagnation in the market at the time of the loss there is difficulty in fixing the precise market value, a resort to other modes of ascertaining it, especially where the vessel has been built but a few years, is at least allowable to be taken into account in arriving at a conclusion. The evidence shows that in 1877, when this vessel was lost, the market for sailing vessels was in a state of stagnation, and it was almost impossible to ascertain any actual sales which would furnish proper data or any criterion for the determination of the actual market value. The different values sworn to are after all but mere estimates, and not based on knowledge of similar sales in 1877. It is impossible, in such cases to determine the amount to be allowed with mathematical certainty. I do not find from the evidence sufficient reason to interfere with the result at which the Commissioner has in this case arrived."

Leonard v. Whitwell, 19 Fed. 548.

Appellant's proctor in his brief at p. 19 quotes from "The Lucille" and we follow his example herewith beginning our quotation at the very period where his quotation leaves off.

"While there is no criterion of market value furnished, and hence difficulty in fixing such value (as is the case here), a resort to other modes of ascertaining it is allowable. Evidence of the cost of

construction is admissible; but such cost is not of itself conclusive of her actual value at the time of collision. The whole cost should not be given as damages in assessing damages in a total loss, but evidence of the cost with deductions for derterioration may be properly resorted to in determining the value. *Leonard v. Whitwell* (D. C.) 19 Fed. 547; *The City of Alexandria* (D. C.) 40 Fed. 697; *The Mobila* (D. C.) 147 Fed. 882."

The Lucille 169 Fed. 719.

Again appellant's proctor at page 14 quotes from Marsden's Collisions at Sea (6th ed.) p. 101, concluding his quotation at the period before the following sentence:

"Her original cost, her condition at the date of her loss, money spent in upkeep, and her past earnings, have all to be considered."

Appellant also quotes from The Mobila at page 19 of its brief, but omits to quote the following:

"While evidence of the cost of the vessel is admissible, the cost plainly is not of itself proof of her actual value at the time she was lost. Full compensation for the loss is the rule in such cases, and it is to be measured by what it would cost to replace her."

"The Mobila," 147 Fed. 883.

Again appellant on page 14 quotes from the Colorado, Fed. cas. 3029 to the effect that market value is the measure of damages, but fails to quote the following:

"There are, of course, exceptions to this rule, as when the vessel lost from some peculiarity of construction in order to adapt her to some special purpose out of the usual course of shipping precludes there being any market value for her. An instance of this may be when a vessel is built for a special trade requiring peculiar and unusual conditions in her construction. In such a case for want of a better criterion of value cost of construction or purchase price, with deduction for depreciation by ordinary wear and age may be resorted to."

Again on pages nine and ten appellant quotes from "Spencer on Marine Collisions," Sec. 200 ending its quotation just before the following paragraph:

"When the conditions are such that no market value can be shown, where there *is* no market value, or, if shown, it is so manifestly disproportionate to the intrinsic value of the vessel that to order a sale at such a price would be a hardship, the Court may adopt as the value of the ship the cost of construction with proper deduction for the deterioration in its value from the time of construction; especially may this method be resorted to if the vessel is but recently built."

"The Utopia" from which appellant quotes on page sixteen is nothing more than a commissioner's report; and in the Laura Lee, 24 Fed. 483 from which appellant quotes at length on pages fifteen and sixteen, it will be noted that the court finally arrived at the value by taking the building cost less depreciation.

See also *The H. F. Dimock,* 77 Fed. 226.

La Normandie, 58 Fed. 427.

The law unquestionably is that where there is no market value or where for any reason market value cannot be shown by reliable evidence that value may properly be proven by proving cost value or reproduction value less depreciation. And it is also the law that, even where there is competent evidence of market value, testimony regarding cost value and reproduction value less depreciation is properly to be considered.

THE APPELLEE'S EVIDENCE FURNISHED THE ONLY TRUSTWORTHY CRITERIA FROM WHICH THE AMOUNT OF THE APPELLEE'S LOSS COULD BE ASCERTAINED AND IT FULLY SUSTAINS THE FINDING OF THE DISTRICT COURT.

As previously indicated our contention is that the appellee, Inland Navigation Company, is to be compensated for the loss of a large well preserved, recently refitted, and very fast passenger steamer—usable on many of its routes which cover the entire Sound; and particularly useful on the Seattle-Everett route for which she was expressly designed and built.

She had in a marked degree the prime requisite of passenger vessels, that is, the ability to make great speed. She was the product of the veteran builder, C. D. Scott, who also built the "Telephone" mentioned frequently by appellant's witnesses as well as thirteen other vessels (R. p. 53). He testi-

fies that she was the "best I ever built," (R. p. 71) and that she was faster than the celebrated "Flyer" another of his successful boats. He says:

"I have always built for carrying passengers, and you have to go fast if you get the passengers. If a boat did not run fast she would not be worth anything to me and no man knows what it cost me in thinking nights and Sundays and weeks and months to get that speed with little power, and I have been doing it every time (R. p. 70).

SPEED OF THE "TELEGRAPH."

The record is replete with evidence that the affectionate care bestowed upon the construction of the "Telegraph" by her builder was not without its reward. Captain Z. B. Murray who commanded her the two years immediately before she was sunk testified that in 1910, when not in the best of condition, she sustained a more than nineteen mile speed for eighteen miles and that she could make twenty miles an hour (R .p. 206). W. H. Gates, Chief Engineer of the "Telegraph" as late as December, 1911, only three or four months before she was sunk, testifies that they ran her right along under a cut-off at a seventeen mile gate, the wheel making twenty-six turns; that he had run her on occasions at thirty-two turns and that she would under such condition make twenty miles an hour (R. p. 214). H. Smith, another former chief of the "Telegraph" testified that when she beat the famous "Flyer" he had her making "about twenty-one miles an hour."

"Between twenty and twenty-one" (R. p. 221). This was made with the old engines, and C. Lake, another Chief Engineer, testified that she ran twenty to twenty-one miles an hour with her old engines (R. p. 284), but that he had charge of her for a number of months when she had the old engines and a number of months after the new were put in and that she maintained about the same speed after the change. (R. p. 227.) George Leach, another Chief Engineer(confirms the testimony of Captain Murray (R. p. 241). W. C. Roach was a first assistant on her, both before and after the new engines were put in and testifies that her speed was not lessened by the change. He thought she could make twenty miles per hour. (R. p. 246.) Captain H. H. MacDonald was mate with Captain Murray when he had charge of her and confirms his testimony. (R. p. 25.)

We think that there can be no question that the fact is proven that the "Telegraph" at the time she was sunk was capable, running under a cut-off, of making, and was making an economical commercial speed of more than eighteen miles per hour and that put into good condition, as she would be for a builder's trial, she was capable of making not only twenty, but even twenty-one miles per hour.

Even appellant's witnesses admit her great speed, Arthur Riggs of Portland testifying that she made ninety miles at a speed between eighteen

and nineteen miles against the current from Astoria to Portland, but with the help of the tide part of the way. He does not say that he was trying to make a record or getting the most out of her. And this was under river conditions. Appellant's proctor asked Riggs whether the "Telegraph" was capable of making twenty miles an hour without the assistance of tide or current, to which he replied:

"I always thought she would in a short run. That is my opinion. I had an idea she would with favorable circumstances, and with plenty of water under her, but I don't know because we never timed her." (R. pp. 301-302.)

ORIGINAL COST OF THE "TELEGRAPH."

C. D. Scott, son of the builder of the "Telegraph" and connected with the company which built her at the time she was built and later its secretary and treasurer, testified that it cost $75,000.00 to build the "Telegraph" without including architect's fees or anything of that kind. (R. p. 13.)

C. D. Scott, the elder, testified that she cost a little over $75,000.00. Such price not including anything for his time or the time of a marine architect. (R. pp. 54-55.) That she was designed for speed, strong and well put together and that it "Would cost ten thousand dollars more today to build the same boat and outfit her the way that boat was" (R. pp. 55-56). To the cost given by Captain Scott a sum should be added for architect's fees amount-

ing to five per cent of the cost (R. p. 38). Appellant offers no testimony to contradict the above,—in fact its own witness, C. W. Cook says: the "Telegraph" cost from $65,000.00 to $75,000.00 (R. p. 316)—but attempts to make light of the evidence by referring to the advanced age of Captain Scott, a witness whose testimony we submit shows in its every line the intelligence, ability and sincerity of the man who gave it. Appellant also attempts to show that the figures include two sets of engines. Captain Scott testified that he got the first machinery at scrap prices (R. p. 54); that it cost but little to take them out when the change was made because he assisted in and directed the work himself. (R. p. 61.) The appellant forgets that as pointed out by Mr. Green in his testimony (R. p. 116) a vessel, especially, a speed vessel, is not completed when she goes into the water. Remodeling and changing of wheels, rudders and even engines must sometimes be done in order to get the most out of the vessel; and under the watchful eye of Captain Scott the cheap machinery was in this process taken out and compound condensing engines put in ,doing away with the necessity of carrying tons and tons of fresh water. These changes gave the boat her individuality as a very fast, economical and efficient vessel, and their cost was properly charged as a part of the cost of the boat because they made her what she was.

REPRODUCTION COST.

Captain Scott and his son testified that the "Telegraph" cost in excess of $75,000.00, without architect's fees. That the Scotts must have told the truth is indicated by the testimony in regard to reproductive cost of competent surveyors, and of the foremost, and the most reliable, ship builders on the Northwest Coast.

Mr. Frank Walker is a marine surveyor, naval architect and consulting engineer, forty-six years of age, apprenticed in his boyhood and has followed his profession, on the Sound for twenty years. He was generally familiar with the "Telegraph," had surveyed and examined her a number of times especially during the year before she was sunk, during a heavy overhauling. He testified that the vessel could be reproduced for Seventy-five or Eighty Thousand Dollars, plus a five per cent Architect's fee. (R. pp. 18-20.)

Mr. Fred A. Ballin (erroneously called Ballar in record) is a naval architect, consulting engineer and marine surveyor of Portland, Oregon, who served his apprenticeship in a shipyard from 1874 to 1877, later attending the naval academy in Berlin, and has practiced his profession for more than twenty years. His occupation has been the building and supervising the building of ships. (R. p. 37.) He is also a surveyor for a long list of marine insurance companies. (R. p. 43.) He had been

aboard of the "Telegraph" a good many times in Portland, (R. p. 37) and several years ago had measured her all up when he was building a stern-wheel boat for the Navy Yard Route. (R. p. 40.)

He testified that she could be reproduced in Portland for Seventy-five or Seventy-six Thousand Dollars without counting architect's fees. (R. p. 38.) That he believes such a vessel could be built at less cost there than in Seattle, (R. p. 47) and that it would cost several thousand dollars to bring her to Seattle. (R. p. 38.)

This testimony coming from men so conspicuously qualified to speak of these matters we felt would be convincing, but we did not stop there. We went to the original sources, the ship builders themselves.

Mr. Joshua Green, the President of the appellee company, asked for bids upon a vessel to duplicate the "Telegraph" from all the responsible builders in the Northwest. (R. p. 84.) This vessel was to be capable of an extreme speed of twenty miles per hour and a commercial speed of eighteen miles per hour; a vessel capable of the same speed as the "Telegraph" was known to be capable of making and which we have proved she was capable of making. (R. p. 114.) Bids were received from firms in Portland, Tacoma, Seattle, Everett and Port Blakely, in fact from all the large and well known shipbuilding firms in the Northwest.

The bid of the Everett Marine Ways appears in the record at Libelant's Exhibit B. They offered to duplicate the "Telegraph" for $86,500.00. Captain Lovejoy, the President of the Everett Marine Ways, a vessel builder and operator for thirty-six years was a witness in the case. (R. p. 72.) He was familiar with the "Telegraph;" said that she ordinarily traveled at a speed of seventeen or eighteen miles and could make better than twenty miles an hour. (R. p. 76.) He prepared the estimate of the Everett Marine Ways and admitted that there was a margin in it on account of the speed guarantee, but said: "I would not think you could duplicate that boat for less than $80,000.00, barring the guaranty." (R. p. 79.)

The bid of the Heffernan Engine Works of Seattle appears as Claimant's Exhibit No. 2. This company offered to duplicate the "Telegraph" for $79,600. The Estimator for this concern, Mr. Simen, its Superintendent, was examined and cross-examined at length. He had had eight years experience on this line of business. He had thoroughly examined the "Telegraph," had made specifications and drawings and estimated that it would cost $76,600 to duplicate her with furnishing any equipment (R. pp. 50-52). He says that he did not figure on a vessel with a twenty mile guaranty, but only on a vessel to duplicate the "Telegraph" (R. p. 124).

The bid of The Seattle Construction and Dry Dock Company appears in the record as Libelant's Exhibit A. The amount is $92,400. In this case also the appellant had an opportunity to examine the estimator for the company, Mr. Mattheson, a Cumberland graduate with eight years drafting experience and four years as an estimator (R. pp. 30, 31). The witness had made a four hour examination of the "Telegraph" and had her specifications from surveyors. They appear in the record as Claimant's Exhibit 6, and as the Court can see are very full and complete. He also had notes taken by himself on the hull, timbers, spacing, planking, etc. (R. p. 101.) He says that he did not understand that his principals would have to guarantee a speed of twenty miles an hour (R. p. 102). He did not make up the amount of the bid, but furnished the cost estimate from which it was made. His own figures as reported to his principal did not include profit or overhead expenses and were in the neighborhood of Sixty-five to Seventy-five Thousand Dollars. (R. p. 104.)

The bid of Crawford & Reid of Tacoma appears as Claimant's exhibit No. 4. They agree to duplicate the vessel for $87,250.00, expressly saying: "We do not care to guarantee speed."

The bid of King & Winge of Seattle appears as Claimant's Exhibit No. 5. They agree to build a duplicate of the Steamer "Telegraph" for $86,000.

Joseph Supple of Portland made the lowest bid $72,500.00 F. O. B. Portland. This appears in the record as Claimant's Exhibit No. 1.

The Proposal of Carlson Bros. of Port Blakely offers to build and equip for Sound service a stern-wheeler "Equal in all respects to specifications of Str. "Telegraph" for $88,000.' "

Captain Scott made a pretty conservative estimate when he said, that at the time of the loss it would have cost Ten Thousand more to build the "Telegraph" than when he built her nine years before; that is, $85,000.00. That is just about the average of the bids of all the firms in the Northwest qualified to build such a vessel.

Appellant had full opportunity to cross-examine the estimators for four of these concerns; and because they use different methods of segregation at times, appears to find them widely differing as to parts. But somehow they reach pretty nearly the same result and appellant will scarcely dare to charge bad faith on the part of practically all the reputable shipbuilders in the Northwest.

But the above figures would not include all the cost of reproducing the "Telegraph." If built on contract the appellee would have to bear the additional expense of hiring a man to check the builder and look out for its interests during construction (R. p. 83). The duplication would cost something in ex-

cess of $80,000.00 taking the very lowest and most conservative bid given, and on the average of the bids more than $85,000.00.

DEPRECIATION.

The appellee bought the boat from Scott a couple of years before she was sunk. At the latter date she was nine years old. Scott says "She was in number one order when I sold her to Mr. Green, almost as good as the day she was built, not quite, there might be a little difference, but she was not rotten any place." "Everything about her was perfect." "We had carpenters there to do all that; everything was in fine shape." He says also that she was worth close to Seventy-Five Thousand at that time (R. p. 57). Later he says "she had depreciated very little because I overhauled her." "I put in everything new, anything that was a bit decayed about the deck or beams or anything. (R. p. 66.)"

Mr. Joshua Green testifies that when the vessel was sunk she was in first class condition and that her depreciation was fifteen to twenty per cent at the outside. She had had new engines and new shaft about three years ago and a thorough overhauling, new shaft and cylinder a year before she was sunk and such of the interior fittings, curtains, carpets, piano, dining room furniture, etc. as had become worn had just been replaced. (R. pp. 84-89.)

Mr. Frank Walker, whose very exceptional fitness to speak of such matters has been previously indicated, and who had several times surveyed the vessel says she was in fairly good condition. (R. p. 20.) He says her hull and woodwork had depreciated about twenty-five per cent and her machinery ten. (R. p. 21.) He testified in effect that the "Telegraph" was worth in excess of Sixty Thousand dollars as can be found by making the computation indicated on page 21.

Mr. Ballin also an exceptionally qualified naval architect and surveyor of long standing, testifies that the "Telegraph" was very well kept up. (R. p. 40.) He did not think the hull had depreciated more than 20 per cent. He says the machinery was about as good as new, but some depreciation on the boiler; that ten per cent would be fair taking a proportion between the engine and boiler. (R. p. 41.) The furnishings he thought had depreciated from twenty to thirty per cent. (R. p. 41.) His testimony would also give a value to the "Telegraph" at the time she was sunk in excess of Sixty Thousand Dollars.

Captain Lovejoy, a builder and operator on the Sound for many years (R. p. 72) says in answer to the question, "Was she well cared for?" "The best of care. I have ridden on her many times." He estimated her depreciation at fifteen per cent. (R. p. 74.) We respectfully ask the Court to consider the

qualifications of these three disinterested witnesses on this subject, as well as Mr. Green's. It comes from disinterested experts, well qualified to judge. It is disputed by no one, except by the biased and irresponsible "Cyclone" Wilson, who placed the depreciation on her upperworks at fifty per cent; and on her boilers at thirty or forty, giving no figures for hull or engine. (R. p. 148.) He arrives at the fifty per cent by guessing that the boat might last eighteen years, and dividing it by two, a method of computation adopted from him by the appellant's proctor in the brief—and by the way almost as novel a scheme of depreciation calculation as saying that a boat a third bigger costs a third more; another proposition announced by Captain Wilson. (R. p. 168.)

It will be noted in this connection that when appellant's proctor had Captain S. B. Gibbs, a competent marine surveyor on the stand shortly after he dismissed the garrulous Wilson that he sought no information from him as to the depreciation of the "Telegraph."

There are one or two other matters on which the appellant lays much stress, one on the price the appellee paid for the vessel. Captain Scott repeatedly testifies that she was worth $75,000.00, when he sold her less than three years before she was sunk. (R. pp. 56, 57, 66, 67.) He testifies that he had no other route to put her on and that the

Interurban was coming into competition; that he was past eighty, and old enough to quit steamboating any way. (R. p. 69.) He testifies as follows:

Q. That is what you mean by saying in your opinion that her value was about $75,000.00?

A. She was worth that, he could not have bought her for that if I had not wanted to quit or no body else. We wanted to quit steamboating to go South—but we did not go South. We had made money enough so as to afford to quit, that is the reason I gave them to Mr. Green almost, that is the truth of it."

Subsequently he says: "That did not decrease the value of the boats because we sold cheap." (R. p. 67.) At another place he says: "He could not have bought them for that if we had not wanted to quit—for that money or twice that." (R. p. 59.) This testimony, together with the other testimony in regard to the value of the boat fully warranted the lower Court in saying in its opinion:

"The circumstances of the purchase, however, as tesetified to by Mr. Scott, the seller, indicate that the boats were purchased by the libelant at much less than their going value, and I do not think that the respondent is entitled to any reduction in the damages to be awarded by reason of the good fortune of the libelant in purchasing the "Telegraph" for less than its value."

In the collection of remarks on pages 67 and 68 of appellant's brief supposed to be derogatory to the "Telegraph" headed by three from the ready

tongue of the pugnacious "Cyclone" Wilson, we find that from time to time certain improvements were made on the "Telegraph" such as compounding her engines, cutting off her stern and bow, etc. All these things no doubt increased the value of the vessel as she came to us. It will not do for appellant to insist on the appellee taking junk value for this vessel upon any such argument.

CONCLUSION

This argument has already been drawn to greater length than, perhaps, the subject warrants and we shall speedily bring it to a close. The lower Court felt that we would not be satisfied with the amount of its award and we are not satisfied with it. After a full reconsideration of the subject in writing this brief we feel that that amount is inadequate to the extent of at least Ten Thousand Dollars. The lower Court, as the appellant points out in his brief (p. 70) evidently figured depreciatoon on the "Telegraph" at the rate of forty per cent—which sum is far in excess of the estimate given by at least three particularly well qualified, and entirely disinterested witnesses, and the result of this was that our loss was estimated at the inadequate amount of $45,000.00. Under these circumstances, we must confess, that we have little patience with an appeal that seeks to render that amount still more inadequate.

That the "Telegraph" was in a class by herself is admitted by everyone. That she possessed a particular value on account of her great speed, especially to the appellee company, with its many routes on the Sound to protect from competitors, canont be gainsaid. That she was especially built for its Seattle-Everett route is admitted. That there was not, in any fair legal acceptation of the term, a market for her, was proven even more convincingly by the appellant's evidence than by our own. That the price, the "some" price which some one, "junkman," or towboat man, or what not, would have paid for her and which appellant insists should measure our compensation—would not in fact have compensated us—is shown beyond a peradventure of a doubt.

Nor can there be any reasonable doubt that under the circumstances we adopted the method approved by the experience of the Courts in proving our damages. The decisions to this effect are numerous, clear and convincing.

Our evidence of cost, given by the builder, himself, is thoroughly sustained by the opinion of men like Walker, Ballin and Lovejoy, and by the bids of practically all the shipbuilding concerns in the Northwest; and furthermore is wholly undisputed. The evidence concerning depreciation was given by as competent marine surveyors as we or anyone could secure; and denied by no one save Captain Wilson.

We feel that the law and the evidence would amply sustain an award of an even larger amount of damages than we received at the hands of the lower Court, and respectfully pray that the amaunt of the award be not reduced one penny, but that it be increased by the amount of our costs expended in defending it against this appeal.

Respectfully submitted,
IRA BRONSON,
J. S. ROBINSON,
Proctors for Appellee.